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A TREATISE  
ON THE  
LAW OF RAILWAYS,  
RAILWAY COMPANIES,  
AND  
RAILWAY INVESTMENTS;

By SIR WILLIAM HODGES, KNT  
LATE CHIEF JUSTICE OF H.M. SUPREME COURT, LATE OF GOOD HOPE.

SEVENTH EDITION.

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AUTHOR OF "RAILWAY AND CANAL TRAFFIC," ETC.

"Of all inventions, the alphabet and the printing press alone excepted, those which  
abridge distance have done most for the civilization of our species."—LORD MACAULAY.

VOL. I.  
THE LAW OF RAILWAYS, &c.

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## PREFACE.

TWELVE years have elapsed since the Editor brought out the Sixth Edition of this work, the present edition having been necessarily postponed until the appearance of the long-delayed Railway and Canal Traffic Act, which received the Royal Assent in August last.

After careful consideration, the book is now issued in two volumes, the first comprising the "text," that is, the law as derived from the statutes and cases, and the second the Statutes at length in chronological order, with the Rules made under them, and a set of Forms and the Standing Orders of both Houses of Parliament, each volume having an index, and cross-references being frequently provided. The more important enactments, of which every word is of importance, such as the 2nd and 7th section of the Railway and Canal Traffic Act, and the 27th section of the Railway and Canal Traffic Act, 1888, are still printed at length in the text notwithstanding their repetition in the second volume, with the remaining sections of the Act from which they are taken, and full extracts are given, as in previous editions, from the more important judgments.

The Board of Trade has just made and submitted to Parliament Rules of very great importance with respect to the "form and manner" of the classifications and schedules to

## PREFACE.

ured by the companies within six months from the passing of the Act of 1888. Looking to the extreme importance of the Board of Trade Rules, and the shortness of the time for their operation, it has been thought better to include them in an Appendix to the first volume, and to issue that volume at once without waiting for the Rules of the Railway and Canal Traffic Commission, which will appear with the full text of the Act in the second volume; the delay of the second volume having the additional advantage of enabling the Editor to include in that volume an annotated print of the Employers' Liability Act if it should be passed.

J. M. L.

THE TRAMP,  
*November 21st, 1889.*

## EXTRACTS FROM

### PREFACE TO THE SIXTH EDITION.

---

THIS Work was first published in the year 1847,\* and the last Edition of it was brought out in the year 1869. The Statute and Case Law of the past seven years have rendered so many alterations and additions necessary, that the present Editor has deemed it advisable, while adhering in the main to the original plan, to deviate from it in not a few details.

The plan of the Work was, and still is, to treat of the Law of Railway Companies in what seems to be a very natural order. The passage of Railway Bills through Parliament—the constitution of the Companies when incorporated—the powers to take land—the machinery for paying compensation—the construction and working of the railway—the rights and liabilities of the Companies as carriers—the law of railway rating—are the principal subjects dealt with in succession. The substance of the Statutes is given in the text, the Statutes themselves being printed in the Appendix, in chronological order. The leading cases are fully treated, and copious extracts are given from the more important judgments.

In the present Edition, the effect of the Statutes and the cases has been, as a rule, more concisely stated. The more important sections, however, notwithstanding the repetition of them in their places in the Appendix, have occasionally been printed at length in the text, and the leading cases are still very fully gone into. Mandamus and Injunction are no longer treated separately, such cases relating to those subjects as specially affect Railway Companies, being now spread over the book under their proper heads. The Standing Orders of the two Houses of Parliament (which have been much assimilated since the date of the last Edition) are summarized

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\* The Second Edition was prepared by Editions by Mr. C. Manley Smith, now  
the Author, the Third, Fourth, and Fifth one of the Masters of the Supreme Court,

FROM PREFACE TO THE SIXTH EDITION.

Following Chapter, while the Standing Orders of the House of Lords, so far as they relate to Railway Bills, are printed at length in the Appendix. A more frequent reference is made to the Special Acts of the Companies, and the establishment of the Railway Commissioners has given so much prominence to toll clauses, that it has been thought desirable to enlarge that portion of the Work which deals with the important subject of Tolls.

J. M. L.

INNER TEMPLE,

*November 13th, 1876.*

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## INTRODUCTORY OUTLINE.

It was in the year 1825 that the first railway—the line from Stockton to Darlington—was opened for passenger traffic in England. The foundation of the present South Eastern, Great Western and London and North Western systems was laid not many years afterwards, and so early as 1832 a passenger duty was levied on railway companies; but the Carriers Act of 1830 makes no mention of railways by name, and all the railway acts of general application have been passed in the reign of Queen Victoria.

The necessity of obtaining compulsory powers of purchasing land involved a resort to the Legislature for a special act in every case, and in addition to this Parliament soon began to exercise a preliminary control over railways by means of standing orders, a non-compliance with which, unless specially dispensed with, was fatal to the bill. Orders of early date required promoters of railway bills to deposit plans of their proposed works with clerks of the peace and other public officers; and in 1837 an act passed directing these officers to allow public inspection of those plans.

In 1839 a general and prospective act obliged all railway companies to convey the mails, for a remuneration to the companies to be determined by arbitration.

In 1840 the Legislature endeavoured to insure the safety of the public by means of the special interposition of a Government department. By an act of that year the Board of Trade was empowered to appoint inspectors of railways, to postpone the opening of passenger railways, to disallow bye-laws, and to institute legal proceedings against companies infringing the law. That Board was further authorized to direct companies to make returns of accidents, and also to furnish returns of traffic, and a table of all tolls from time to time levied.

The passenger duty on railways, which had been fixed in 1832 at one halfpenny per mile for every four passengers carried, was by an act passed in 1842 fixed at 5 per cent. on the gross receipts for passenger traffic. A Railway Regulation Act of the same year

2 & 3 Will. 4,  
c. 120.

Deposit of plans.

1 Vict. c. 83.

Conveyance of  
mails.  
1 & 2 Vict. c. 93.

Supervision by  
Board of Trade.  
3 & 4 Vict. c. 97.

Passenger duty.

5 & 6 Vict. c. 79.

5 & 6 Vict. c. 55.

extended the powers of the Board of Trade in relation to the opening of passenger railways and other matters.

Government  
purchase—  
Cheap trains.  
7 & 8 Vict. c. 85.

In 1844 was passed the act for enabling the Government to purchase railways and to revise tolls. By this statute the Treasury was empowered to revise the tolls of any railway company whose dividends should equal or exceed 10 per cent., and to fix a revised scale to be accompanied by a Government guarantee of a 10 per cent. dividend during its subsistence. Terms of purchase were fixed at twenty-five years' purchase of annual profits, with an additional amount to be determined by arbitration in the case of companies paying less than 10 per cent. This act applies to lines authorized in and after 1844 only, and does not become available until twenty-one years after the passing of each special act. It came, therefore, into operation first in 1865; and a Royal Commission, appointed shortly after that date, reported—(1) that it was then inexpedient to carry the policy of the act into effect; and (2) that the act itself did not afford the best means for doing so at any future time. By the same statute (thence commonly known as the Cheap Trains Act) the companies were enjoined to run one train a day at fares not more than a penny per mile, at a speed not less than twelve miles an hour, having carriages protected from the weather, and stopping at every station on the line.

Clause of special  
act subjecting  
company to all  
future general  
acts.  
Standing Order,  
1845.

The session of 1845 was an important one for railway companies. A standing order passed both Houses of Parliament, prescribing that each special act should contain a clause declaring that the railway authorized thereby should be subject to the operation of all future general railway acts. With slight verbal modifications every special act passed since 1845 contains a clause to that effect.

The three Con-  
solidation Acts  
of 1845 —  
6 Vict. c. 16.  
8 Vict. c. 18.  
8 Vict. c. 20.

The passing of the three Consolidation Acts of 1845, called respectively the Companies Clauses, the Lands Clauses and the Railways Clauses Consolidation Act, effected an important change—mostly in the formal portion of the law. Till 1845 each special act was complete in itself, all the complicated provisions relating to the constitution of the companies, the compulsory purchase of land and the construction and working of the railway, being repeated over and over again in each act at great expense and inconvenience. The Consolidation Acts were of great advantage in providing three uniform codes for all companies, to be of universal application, except as varied expressly by the special acts. These codes, however, were not retrospective, and much of the difficulty of railway law will be found to arise from their co-existence with the earlier special acts. It is to be regretted, too, that the Consolidation Acts themselves are, as a rule, obscurely drawn; and that the Railways Clauses Consolidation Act, especially in the portion which deals

with the powers of the companies in relation to tolls, is ambiguous and incomplete.

In 1846 the whole jurisdiction of the Board of Trade over railways was transferred to five Commissioners of Railways.

Commissioners  
of Railways.  
9 & 10 Vict.  
c. 105.  
Uniform gauge.  
9 & 10 Vict c. 87.

In the same year an uniform gauge of "4 feet 8½ inches in Great Britain and 5 feet 3 inches in Ireland" was prescribed for all railways, with certain exceptions in favour (amongst others) of "any railway in its whole length southward of the Great Western Railway."

In 1851 the powers of the Commissioners of Railways were re-transferred to the Board of Trade.

14 & 15 Vict.  
c. 61.

The numerous amalgamation bills presented to Parliament in the year 1853 led to the passing of the Railway and Canal Traffic Act, 1854, which effected a most important alteration of the law. This act first laid upon the railway companies the obligation to provide "reasonable" facilities for receiving, forwarding and delivering both their own traffic and the traffic of other companies, and to abstain from "unreasonable" preference of any particular person or traffic, and then provided, that any person aggrieved by the contravention of the act might apply to the Courts of Common Pleas in England and Ireland, and the Court of Session in Scotland, for an injunction against the company complained of. For the first two years after the passing of the act this novel procedure was much resorted to; but the decisions of the Court as to what were "reasonable" facilities and what was an "unreasonable" preference gradually fell off both in number and uniformity, and with regard to through traffic and "facilities" independent of preference, the act was practically a dead letter until 1873. In Ireland no cases, and in Scotland only four cases, appear to have been brought before the Court. The gist of the vexed 7th section of the Act of 1854 may be stated under two heads. First, it enacts that special contracts by the companies avoiding their liability as insurers in respect of the carriage of goods and animals are to be void, unless, (1) signed by the consignor in any event, and (2) held "reasonable" by the Court or a judge in the event of litigation. Secondly, it gives the companies the benefit of a limited liability in respect of horses, cattle, sheep and pigs, unless the consignor be willing to pay an extra charge, in which case the companies are authorised to demand a "reasonable percentage" upon the excess of the value of the animals consigned.

Railway and  
Canal Traffic  
Act, 1854.  
Obligation to  
afford "reason-  
able facilities."  
17 & 18 Vict.  
c. 31.

Passing over the Railway Companies Arbitration Act, 1859, the next statute of importance which we arrive at is the Railways Clauses Act, 1863. By this act, which applies to the companies only so far as expressly incorporated by special act, companies are bound to erect

Railways  
Clauses Act,  
1863.  
26 & 27 Vict.  
c. 72.

lodges at level crossings, and the Board of Trade may require erection of a bridge instead of a level crossing over a public carriage road. It is enacted, that public notice be given of the intention of the company to enter into working agreements, and that such agreement shall have no operation until sanctioned by the Board of Trade, and shall be subject to revision by that Board, "if of opinion that the interests of the public were prejudicially affected thereby." Provisions are also inserted for securing equal treatment of the public in the working of steam vessels, and for the protection of the interests of navigation by the Board of Trade.

26 & 27 Vict.  
c. 118.

The Companies Clauses Act, 1863, consolidated a number of provisions relating to preference and debenture stock.

Certificates of  
Board of Trade  
in lieu of special  
act.

27 & 28 Vict.  
c. 120.  
27 & 28 Vict.  
c. 121.

In 1864 it was attempted by two acts, called respectively the Railway Companies Powers Act, 1864, and the Railways Construction Facilities Act, 1864, to lighten the labour of legislation by empowering the Board of Trade to substitute "certificates" for special acts.

By the former act a "certificate" may empower companies to enter into working agreements for the joint occupation of lands, to defer the sale of superfluous lands, and to raise additional capital. By the latter act a "certificate" may empower a company to construct a railway, with the concurrence of landowners and others parties interested. A schedule of maximum charges is appended to the act. It is purely discretionary with the Board of Trade whether they shall grant "certificates" under these acts; but a certificate, when granted, has all the force of a special act.

Protection of  
creditors.  
29 & 30 Vict.  
c. 108.

Scheme of  
arrangement by  
insolvent com-  
pany.  
30 & 31 Vict.  
c. 127.

The Railway Companies Securities Act, 1866, passed for the protection of railway creditors, enacted, that every mortgage deed and certificate of debenture stock should bear upon it a declaration by two directors and a "registered officer," that the amount borrowed is not in excess of the borrowing powers of the company. And the Railway Companies Act, 1867, provided that companies unable to meet their engagements may file a "scheme of arrangement," which, when assented to by creditors, and confirmed by the Chancery Division of the High Court, has the same effect as a statute. The same act contained a temporary provision, afterwards continued from year to year, and finally made perpetual in 1875, that the rolling stock of a railway company should not be liable to be taken in execution.

31 & 32 Vict.  
c. 110.

The lengthy Regulation of Railways Act, 1868, which followed closely upon the report of the Royal Commission appointed in 1865 to inquire into the whole subject of railway law, contains no enactment of the first importance. It may be well, however, to direct attention to some of its provisions. Railway companies became bound to prepare,

for sale to shareholders on demand, full half-yearly statements of account, and also correct copies of the shareholders' address book. The Board of Trade was empowered to authorise "light railways,"—to be worked by engines weighing not more than eight tons for each pair of wheels, at a speed not exceeding twenty-five miles an hour—and to appoint arbitrators to determine compensation questions in case of accident. Compensation questions, arising out of the compulsory purchase of land, were allowed to be tried before a judge and jury in the same manner as ordinary actions—a provision which has been but little, if at all, made use of. With regard to the carriage of passengers, it was provided that the companies must publish their passenger fares, must provide smoking carriages, and must establish communication between passengers and the company's servants in every passenger train travelling more than twenty miles without stopping. In the case of a company owning steamers, it was enacted, that the company should make no reduction or advance in the fares charged in consideration of the passenger having used or not used the company's railway or steam vessel. And the whole of the Railway and Canal Traffic Act, 1854, was extended to such steam vessels and the traffic carried thereby.

The Regulation of Railways Act, 1871, enlarged the powers of the Board of Trade, first given in 1840 and 1842, with respect to the inspection of railways and returns of accidents. By this act the companies were enjoined to send notice to the Board of Trade of any fatal accident or accident causing personal injury, of any collision with a passenger train, and of any passenger train leaving the rails,—the Board having power to direct an inquiry to be made into the cause of any accident of which notice was sent. Moreover, the companies became bound to furnish the Board of Trade with annual statements of capital, traffic and working expenditure. Opportunity was taken to provide that where railway companies contract to carry across the sea by a vessel not their own, their liability should be the same as if the vessel belonged to them.

Returns as to  
accidents.  
34 & 35 Vict.  
c. 78.

Two acts of importance were passed in 1873, the one being styled Regulation of Railways Act, 1873, and the other bearing the short title of the Railway Regulation (Returns of Signal Arrangements, Working, &c.) Act, 1873. The latter act may be dismissed in a few words. It directs that the companies shall annually forward to the Board of Trade full returns of the number of cases in which a passenger line is crossed on the level, in which the requirements of a railway inspector have or have not been complied with in relation to safety points, &c., of the number of miles worked on the absolute and permissive blocks systems respectively, and of numerous other minute particulars appearing in a form scheduled to the act.

Regulation Act,  
1873.  
36 & 37 Vict.  
c. 48.

36 & 37 Vict.  
c. 76.



Railway Commissioners,  
86 & 87 Vict.  
c. 48.

The former and more important act of the year 1873 established a new tribunal, bearing the title of "The Railway Commissioners." They were not to be more than three in number; one to be of experience of the law, one of experience in railway business. For the third Commissioner no special qualification was named. The principal duty of the Commissioners under this act was to enforce the observance of the 2nd section of the Railway and Canal Traffic Act, 1854, as amended by the act in some important particulars. The Commissioners had power to enjoin the forwarding of through traffic at through rates—but this latter important power could be set in motion by the companies only. The comprehensive terms of the 2nd section of the Act of 1854, which, as we have seen, enjoin both railway and canal companies to afford all "reasonable" facilities for the forwarding of their own and through traffic, are to abstain from all "unreasonable" preference of any particular person or traffic, were repeated verbatim in the Act of 1873, and it was left entirely to the judgment of the Commissioners to decide what is reasonable. The Act was temporary only, and expressed to continue in force for five years after the 21st July, 1873, "and thenceforth until the end of the then next session of parliament, but successive Expiring Laws Continuance Acts kept it up until the end of 1888."

live  
substances

The Explosives Act, 1875, directs that every railway company carrying gunpowder and explosive substances shall make bye-laws regulating the conveyance of such substances; such bye-laws not to have any operation until sanctioned by the Board of Trade. A "model code" under this act was promulgated shortly after the passing of it.

Continuous  
brakes.

In 1878 the Railway Returns (Continuous Brakes) Act, provided that the companies should twice in every year furnish returns to the Board of Trade respecting the use of continuous brakes on their passenger trains, the returns to show the kinds of brakes adopted, the amount of stock fitted and not fitted with continuous brakes, the number of cases in which continuous brakes failed to act, and other particulars appearing from an elaborate form scheduled to the Act. This statute is as yet the only legislative outcome of the Report of a Royal Commission on Railway Accidents, which recommended, amongst other things, in 1877, "that railway companies should be required by law to supply all trains with sufficient brake power to stop them within 500 yards under all circumstances."

Employers'  
liability.

In 1880 the Employers' Liability Act greatly extended the liability of railway companies to make compensation for personal injuries suffered by their servants. At common law, by what was termed the doctrine of "common employment" it had been laid down that a master was not liable to his servant for injuries done by a fellow-

servant, and this rule was applied to its full extent to railway service, so that a porter could receive no compensation from a railway company for the negligence of an engine-driver, or a pointsman, or that of the superintendent of the line. The act of 1880 very greatly modifies in favour of servants, though it does not entirely abolish, the common law rule generally, and in regard to railway service in particular, provides that fellow-service shall be no defence to an action by a servant to recover compensation for the negligence of a signalman, pointsman, engine-driver, or guard.

In 1882 the Post Office Parcels Act, 1882, made the conveyance of parcels for the Post Office obligatory upon the companies for a remuneration therein mentioned, the companies to be under no liability in respect of the conveyance, and also to have the right of conveying parcels on their own account.

Post Office  
parcels.

In 1883 the Cheap Trains Act terminated a long standing controversy between the Government and the companies in respect of the passenger duty. Since 1844 there had been an exemption of a special kind of third-class traffic from this duty, but it could only be gained by the trains called "parliamentary trains" stopping at every station, one of which the companies were compelled to run daily. An exemption for fares at not more than one penny per mile was substituted, and in the case of other fares in populous districts, the duty was reduced from five to two per cent. At the same time the obligation to run the daily stopping trains was abolished, and for it was substituted a general obligation to provide sufficient accommodation at fares not exceeding one penny per mile, and also proper and sufficient workmen's trains. The act also materially reduced the fares to be paid for conveyance of troops and police.

Cheap trains

Finally, we come to the Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25. By this Act the jurisdiction of the Railway Commissioners is transferred to a new tribunal, styled the Railway and Canal Commission, consisting of three "ex-officio" Commissioners, and two "appointed" Commissioners. The ex-officio Commissioners are to be judges of the Superior Courts of England, Scotland, and Ireland, each of them to act only in and for the country for which he is nominated (a); of the appointed Commissioners one is to be of experience in railway business, while for the other no special qualification is named (b). To the Commission thus constituted is transferred all the jurisdiction of the Railway Commissioners under the Act of 1873,

Railway and  
Canal Com-  
mission.  
51 & 52 Vict.  
c. 25.

(a) Lord Trayner has been nominated for Scotland, and Murphy, J., for Ireland; the judge to act for England has not yet (November 21st, 1888) been nominated.

(b) The Right Hon. Sir F. Peel, K.C.M.G., and W. P. Price, Esq. (formerly chairman

of the Midland Railway Company), both commissioners under the Act of 1873 during the whole period of its continuance, have been appointed Commissioners under the Act of 1888.

which act, except as to the Commissioners and some few other matters, is made perpetual—with the added jurisdiction to award damages, to enforce obligations arising under special acts, and to enjoin the affording of traffic facilities notwithstanding traffic agreements. County Councils and Chambers of Commerce and Agriculture have a *locus standi*, and the power of applying for through rates is no longer confined to the public. In respect of undue preference the burden of proving that any preference is not undue is expressly thrown upon the companies, "group rates" are sanctioned, and the Commission is authorised to consider whether a lower charge is necessary to secure traffic in the interests of the public, with the important proviso that no distinction is to be made between the treatment of home and the treatment of foreign merchandize. The act also further extends the application of the Act of 1873 to canal companies, and provides for the inspection of canals and returns of traffic by canal companies. \*

In addition to these important amendments of the law, the act takes an entirely new departure in imposing upon all the companies the obligation to frame new classifications and schedules of rates for goods and animals in lieu of the existing classifications and schedules which have been frequently denounced as imperfect and anomalous, and in entrusting to the Board of Trade under the control of Parliament with the duty of settling, after hearing parties interested, the classification and schedules proposed by the companies; the Board itself being empowered in the last resort to initiate, carry forward, and bring into operation, under the control of Parliament, classifications and schedules prepared by themselves.

The 35th section of the Act empowers the Board of Trade to make rules with respect to the "form and manner" in which the new classifications and schedules are to be submitted. Draft rules were laid before Parliament *as draft rules only* on the day of the August adjournment of the session of 1888; and the same rules with some slight amendments were formally promulgated in November following. These rules pave the way for alterations of the greatest importance by newly requiring maximum truck load rates, and maximum rates graduated according to distance of traffic carried. See the rules, post, p. 700.

It is hoped that the more important provisions of the numerous general statutes relating to railway companies have now been sufficiently noticed for the purpose of an Introduction. Chiefly springing out of these statutes, but also out of the obligations of the companies at common law, a very large number of cases have come before the Courts.

The subjoined Alphabetical Table of what may be termed "Leading Cases" may, perhaps, be found useful :—

A.D. 1854	ABERDEEN R. CO. v. BLAKIE ..... 1 <i>Macq.</i> 461, and p. 32, post.	A railway director can take no benefit from a railway contract.
1852	BLAKE v. MIDLAND R. CO. .... 18 <i>Q. B.</i> 93, and p. 633, post.	Damages under Lord Campbell's Act are confined to injuries of which a pecuniary estimate can be made, but the loss of an extra provision which the deceased might have been reasonably expected to have made for his family may be taken into account.
1863	PYM v. GREAT NORTHERN R. CO. .... 4 <i>B. &amp; S.</i> 393, and p. 634, post.	
1872	BLOWER v. GREAT WESTERN R. CO. .... <i>L. R.</i> , 7 <i>1. P.</i> 655, and p. 558, post.	The company, as carriers of animals, are not responsible for injury caused to the animals by their own vice or unruliness.
1868	BLOXAM v. METROPOLITAN R. CO. .... <i>L. R.</i> , 3 <i>Ch.</i> 337, and p. 48, post.	A single shareholder, who has become such for the purpose of litigation, may maintain an action against the company.
1866	DEARDEN v. TOWNSEND..... <i>L. R.</i> , 1 <i>Q. B.</i> 10, and p. 513, post.	A bye-law, imposing a penalty for travelling without fare paid, can only be enforced in case of an attempt to defraud.
1885	DENABY MAIN COLLIERY CO. v. MANCHESTER, SHEFFIELD AND LINCOLNSHIRE R. CO..... <i>L. R.</i> , 11 <i>App. Cas.</i> 97, and p. 467, post : 3 <i>N. r. &amp; Mac.</i> 441, and p. 476, post.	Rates need only be equal between the same points of arrival and departure, but rates unequal between such points may be restrained as unduly preferential.
1856	DENTON v. GREAT NORTHERN R. CO..... 5 <i>E. &amp; B.</i> 860, and p. 637, post.	The time-tables of a company constitute a contract with the public that all trains shall start as therein specified.
1852	EASTERN COUNTIES R. CO. v. HAWKES... 5 <i>H. L. C.</i> 331, and p. 157, post.	A company agreeing to buy land will be compelled to carry out their contract, although the land be not required for the purpose of the railway.
1878	EVERSHED v. L. AND N. W. R. CO..... <i>L. R.</i> 3 <i>App. Cas.</i> 1023, and p. 446, post.	An unequal charge is none the less illegal though it be made to support competition.
1848	FOSS v. HARBOTTLE ..... 2 <i>Harc.</i> 461, and p. 46, post.	In the absence of illegality, oppression or fraud, the Court will decline to interfere between directors and shareholders.
1867	GARDNER v. L. O. AND D. R. CO..... <i>L. R.</i> , 2 <i>Ch.</i> 201, and p. 127, post.	Unpaid debenture holders are not entitled to seize the rents and sale proceeds of superfluous lands.
1861	GOFF v. GREAT NORTHERN R. CO..... 3 <i>E. &amp; B.</i> 672, and p. 654, post.	A railway company is liable to an action of false imprisonment for a wrongful arrest by a servant in the course of his employment.
1867	GREAT WESTERN R. CO. v. BENNETT .... <i>L. R.</i> , 2 <i>H. L.</i> 27, and p. 240, post.	The respective rights of the company, and the owners or lessees of mines, are regulated solely by the Railways Clauses Consolidation Act.
1874	GREAT WESTERN R. CO. v. MAY..... <i>L. R.</i> , 7 <i>H. L.</i> 283, and p. 334, post.	When land which has been used for the purposes of the railway is abandoned by the company, it becomes superfluous land and must be sold, or in default vests in adjoining owners.
1869	GREAT WESTERN R. CO. v. SUTTON ..... <i>L. R.</i> , 4 <i>H. L.</i> 226, and p. 467, post.	Overcharges to carriers in respect of packed parcels can be recovered from the company by action.
1885	HALL v. LONDON, BRIGHTON AND SOUTH COAST R. CO. .... <i>L. R.</i> , 15 <i>Q. B. D.</i> 505, and p. 562, post.	Station and similar accommodation may be charged for as a terminal charge.

A.D. 1869	HAMMERSMITH R. Co. v. BRAND..... <i>L. R.</i> , 4 <i>H. L.</i> 171, and p. 231, post.	The damage in respect of which compensation is claimed from a railway company injuriously affecting land must arise from the construction, not the working of the railway.
1861	HAYNES v HAYNES ..... 1 <i>Dr. &amp; Sm.</i> 426, and p. 176, post.	The notice to treat given by a railway company to a landowner does not of itself constitute a contract, so as to entitle the company to specific performance.
1842	HINTON v. DIBBIN ..... 2 <i>Q. B.</i> 646, and p. 600, post.	The Carriers Act protects the carrier from liability for loss caused by gross negligence.
1849	HUTTON v. LONDON AND S. W. R. Co. ... 7 <i>Hare</i> , 259, and p. 198, post.	The works of a railway company injuriously affecting land may be commenced before compensation is paid.
1849	JOHNSON v. MIDLAND R. Co..... 4 <i>Ex.</i> 387, and p. 543, post.	A railway company are only bound to carry according to their profession.
1876	LE BLANCHE v. L. AND N. W. R. Co. .... <i>L. R.</i> , 1 <i>C. P. D.</i> 286, and p. 637, post.	The positive words of the ordinary engagement of a time-bill to pay every attention to ensure punctuality, override the negative provision that the company will not be responsible; and a company is liable for unpunctuality caused by negligence, notwithstanding the negative provision.
1871	LEE v. LANCASHIRE & YORKSHIRE R. Co. <i>L. R.</i> , 6 <i>Ch.</i> 527, and p. 598, post.	A receipt in discharge of claim in full is not conclusive so as to preclude an injured passenger from suing a railway company for further compensation.
1872	M'CRAWLEY v. FURNESS R. Co. .... <i>L. R.</i> , 8 <i>Q. B.</i> 57, and p. 558, post.	A contract by which a drover travels with cattle at his own risk exempts the company from all liability for negligence.
1876	M'QUEEN v. GREAT WESTERN R. Co..... <i>L. R.</i> , 10 <i>Q. B.</i> 569, and p. 580, post.	To make a case for the jury in support of a reply of felony under the Carriers Act, it is not enough to show that the carriers' servants had greater facility of access to the goods lost than any other persons.
1876	MORITT v. NORTH EASTERN R. Co..... <i>L. R.</i> , 1 <i>Q. B. D.</i> 308, and p. 574, post.	The Carriers Act protects the carrier from liability for loss of or injury to goods negligently carried beyond their destination.
1870	MUNNS v. ISLE OF WIGHT R. Co..... <i>L. R.</i> , 5 <i>Ch.</i> 414, and p. 194, post.	The right of the public to use or travel on a railway will be postponed to the right of an unpaid vendor, who may obtain an order for a sale, but not an injunction, until sale, to prevent the running of trains.
1846	NORTH BRITISH R. Co. v. TOD..... 12 <i>Cl. &amp; F.</i> 722, and p. 339, post.	The plans of the line are not binding upon landowners, except so far as they are made part of the special act.
1863	PEEK v. NORTH STAFFORDSHIRE R. Co... 10 <i>II. L. C.</i> 473, and p. 565, post.	Special contracts, exempting railway companies from liability for loss of or injury to goods or animals, must be signed by the consignor, and cannot be enforced unless held reasonable by the Court.
1876	POTAL v. EMMENS..... <i>L. R.</i> , 1 <i>C. P. D.</i> 201, 664, and p. 91, post.	A railway director is liable, on <i>scire facias</i> , to a creditor of the company, up to the value of his statutory qualification, although no shares have been allotted to him.
1883	POUNCEY v. CLAYTON ..... <i>L. R.</i> , 11 <i>Q. B. D.</i> 820, and p. 336, post.	The purchaser from a company of superfluous land, compulsorily purchased by them with minerals acquires no right of subjacent support.

A.D.		
1874	POWELL DUFFEYN STEAM COAL CO. v. TAFF VALE R. CO. .... <i>L. R.</i> , 9 <i>Ch.</i> 381, and p. 442, post.	The statutory right of the public to use a railway as a highway will not be enforced in practice.
1869	READHEAD v. MIDLAND R. CO. .... <i>L. R.</i> , 4 <i>Q. B.</i> 379, and p. 594, post.	A railway company carry passengers not as insurers but under a contract to take due care.
1851	R. v. LONDON AND BRIGHTON R. CO. .... 6 <i>Railway Cases</i> , 440, and p. 654, post.	In assessing a railway to the poor rate, the rate must be founded upon the parochial principle, and not upon a mileage calculation.
1867	RICKET v. METROPOLITAN R. CO. .... <i>L. R.</i> , 2 <i>H. L.</i> 175, and p. 213, post.	Compensation under the Lands and Railways Clauses Acts is recoverable only in respect of such damage to the land itself or to some interest therein, as would have been actionable if it had not been done in the exercise of the powers under those acts.
1881	SOUTH EASTERN R. CO. v. RAILWAY COMMISSIONERS ..... <i>L. R.</i> , 6 <i>Q. B. D.</i> 586, and p. 485, post.	A company may be ordered to give facilities for receiving traffic at any existing station, notwithstanding that the execution of the order may necessitate some structural alterations of the station.
1871	THOMAS v. RHYMNEY R. CO. .... <i>L. R.</i> , 6 <i>Q. B.</i> 366, and p. 643, post.	A contract to carry over the line of another company renders the contracting company liable for damage happening by the default of the forwarding company.
1856	VANCE v. EAST LANCASHIRE R. CO. .... 3 <i>K. &amp; J.</i> 50, and p. 59, post.	Directors will be restrained from defraying the expenses of an extension bill out of the funds of the company, but not from promoting the bill itself.
1860	VAUGHAN v. TAFF VALE R. CO. .... 29 <i>L. J., Ex.</i> 247, and p. 657, post.	A railway company authorized by statute to run locomotive engines is not liable, in the absence of negligence, for injury done to land adjoining the line by sparks thrown out from such engines.
1853	YORK AND N. MIDLAND R. CO. v. REG.... 1 <i>E. &amp; B.</i> 868, and p. 371, post.	A mandamus does not lie to compel a railway company to construct its line.
1859	ZUNZ v. SOUTH EASTERN R. CO. .... <i>L. R.</i> , 4 <i>Q. B.</i> 539, and p. 546, post.	Special contracts exempting the companies from liability for loss of or injury to goods or animals, happening on the lines of other railway companies, are not within the 7th section of the Railway and Canal Traffic Act.



## ADDENDA ET CORRIGENDA

UP TO MARCH 11TH, 1889.

- At p. xviii (in the Table of Cases) for "xlv." the reference to *Butler v. Manchester, Sheffield, and Lincolnshire R. Co.*, read "515."
- At p. 98 *add.* In *Mutter v. Eastern and Midlands R. Co.*, 59 L. T. 117, it was held that the right under sect. 28 of C. O. Act, 1815, to inspect includes a right to take copies.
- At p. 104 *add.* *Nanney v. Morgan* is now reported L. R. 37 Ch. D. 346; 57 L. J., Ch. 311; 36 W. R. 677; 58 L. T. 328.
- At p. 104 *add.* As to invalidity of transfer of stock by one only of two holders, see *Barton v. North Staffordshire R. Co.*, L. R. 38 Ch. D. 458, where one of two trustees forged the name of the other, who, with a new trustee, obtained an order for the replacement of the stock.
- At p. 146 *add.* A railway company must, under sect. 46 of the Railways Clauses Act, 1845, repair the road over a bridge, as well as the bridge itself. *Mayor, &c., of Bury v. L. and Y. R. Co.*, L. R., 20 Q. B. D. 485; 57 L. J., Q. B. 280; 59 L. T. 193; 36 W. R. 492—C. A.
- At p. 180, note (f), *add.* "See this case distinguished in *Birmingham and District Land Co.*, L. R. 36 Ch. D. 650, *aff.* by C. A. 40 Ch. D. 268.
- At p. 383 *add.* A conveyance of superfluous land provided that the purchase-money should not be payable until two years after the period limited by statute for sale. Upon re-sale by the purchaser, it was objected that the conveyance by the railway company was not an absolute sale within sect. 127 of the Lands Clauses Act, 1815; and it was held, on the authority of dicta in *Gumm's case*, that the title was not one which the Court should force upon a purchaser.  
*In Re Thackray and Young's Contract*, L. R. 40 Ch. D. 34; 58 L. J. Ch. 72, per Chitty, J.
- At p. 382 *add.* The duty of a company whose railway crosses a public road at a level is to erect and maintain such gates as will fence in the railway and keep from off it cattle and horses passing along the road; so that a company which, in addition to broad gates for carriages, horses, and cattle, erected narrow gates for foot passengers insufficient to exclude horses and cattle, was held liable to the owner of horses straying on the road and breaking through them.  
*Charman v. S. E. R. Co.*, L. R. 21 Q. B. D. 524; 57 L. J. Q. B. 596—C. A.
- At p. 486 *add.* A prohibition issued on March 4th, 1889, in the *Distington case*, on the ground that the Railway Commissioners had misconceived the meaning of sect. 2 of the Railway and Canal Traffic Act, 1854, in holding that it applied to rates irrespective of a preference.



At p. 487 *add.* The 2nd section of the Railway and Canal Traffic Act, 1854, is not infringed by a railway company which owns two separate docks twenty miles apart and a line of railway connected with one of such docks (and thereby constituted a railway company within the meaning of the Railway Companies Act, 1867) charging preferential dock dues to the prejudice of one shipowner using the docks not connected with the line of railway, in favour of other shipowners.

*East and West India Dock Co. v. Shaw, Savill and Albion Co.*, L. R. 39 Ch. D. 524.

At p. 519 *add.* A person crossing a railway, at a place where there is no authorised level crossing, in assertion of a right of way which existed before the construction of the railway, cannot be convicted by justices for trespassing on the railway, inasmuch as he sets up a *bona fide* claim of right, which ousts the jurisdiction of the justices.

Nor is the right of way extinguished by the construction of the railway.

*Cole v. Miles*, 57 L. J. M. C. 132.

At p. 522 *add.* Where an agreement between two railway companies contains a provision that all matters in dispute between them shall be referred to arbitration, the true operation of sects. 4 and 26 of the Railway Companies Arbitration Act, 1850, is to make it obligatory on the courts, if the right is asserted by either company at the proper time, to refer the matter to arbitration under the provision in the agreement; but it does not deprive the Court of jurisdiction to try the case where neither party asserts the right to have it referred to arbitration.

*L. C. & D. R. v. N. E. R. Co.*, L. R. 40 Ch. D. 100; 58 L. J. Ch. 75—C. A.

At p. 512 *add.* The 23rd section of the Act of 1867, by which mortgage debts of a company have priority, does not entitle the mortgagees to payment in priority out of proceeds of superfluous lands sold on application of judgment creditors.

*Hull v. Barnsley R. Co., In re*, L. R. 40 Ch. D. 118—C. A.

# THE LAW RELATING TO RAILWAYS.

## CHAPTER I.

### ON THE FORMATION OF RAILWAY COMPANIES AND THE PASSAGE OF RAILWAY BILLS THROUGH PARLIAMENT.

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#### 1. *Legal Position of Promoters.*

#### 1. *Promoters.*

A BODY of persons associated together for the purpose of promoting a railway bill in Parliament has no recognized legal existence as such; and although such persons may register, and in some very few cases have registered, under the Joint Stock Companies Acts, they are by no means bound to do so, whether their associations consist of more than twenty persons or not. The prohibitory clause of the Joint Stock Companies Act, 1862, which provides that, without registration under that act, no association consisting of more than twenty persons shall be formed for the purpose of carrying on business that has for its object the acquisition of gain by the company (a), has no application to the promoters of a bill. Such persons are associated together not for the purpose of carrying on a business, but for the purpose of obtaining the permission of the Legislature to carry on a business which cannot be carried on without such permission. If the permission be given, it is embodied in a special act of Parliament, which incorporates the promoters, and dispenses with registration under the Joint Stock Companies Acts, (b). The exception, by s. 199 of the Joint Stock Companies Act, 1862, of railway companies from the liability to be wound up as unregistered

Promoters need  
not be registered

(a) 25 & 26 Vict. c. 89, s. 4.  
(b) *Ib.* By an act passed in 1844, 7 & 8 Vict. c. 110, s. 4, promoters were required

to be registered provisionally, but that act was repealed by the Joint Stock Companies Act of 1862.

1. *Promoters.*

Promoters not partners.

companies applies only to companies whose principal object is the construction of a railway (c).

It may now be considered as settled, notwithstanding former decisions to the contrary effect (d), that the promoters of a railway bill are not partners (e) and have no common power of binding each other by such a relation. The liability of each promotor for the act of his fellows will depend therefore not on the law of partnership, but on that of principal and agent (f). The liability of promoters to each other will depend upon the law of guarantee as well. Where the secretary of a projected railway company by the authority of the promoters, and by means of a cheque signed by two of them, obtained an advance from the plaintiff to be repaid out of calls, and no calls were made owing to the abandonment of the undertaking, it was held that the advance was made upon the personal responsibility of the two promoters who signed the cheque, and that the plaintiff could recover the amount advanced from those promoters (g).

2. *Progress of Bill through Commons.*

Parliamentary agents.

2. *Progress of the Bill through the House of Commons.*

Since 1836 private bills have been entrusted to "parliamentary agents," who are, so far as the House of Commons is concerned subject to rules framed by the Speaker. The rules now in force bear date March, 1873, and require that the agent shall be personally responsible to the House for the observance of the rules and for the payment of fees. In 1876 a Joint Select Committee of the two Houses recommended that fitness for the office of parliamentary agent should be tested (with the fullest protection for vested rights) by a special examination (h).

The Standing Orders of the Houses of Parliament.

The practice of Parliament is mainly based on the "Standing Orders," which are issued in a revised form shortly after the close of each session. It is proposed to give a short summary of the Standing Orders which were issued after the August adjournment of the session of 1888, and which are applicable to bills to be promoted in 1889. It will be convenient to adhere to the arrangement, followed in former editions of this work, of considering, in the first place, the progress of the bill through the Commons. It may be remarked that the

(c) *Re Ermenth Dock Co.*, L. R., 17 Eq. 181; 43 L. J., Ch. 110.

(d) *Holmes v. Hygins*, 1 B. & C. 74; *Lucas v. Bruch*, 1 M. & G. 417. See these cases explained, Lindley on Partnership, p. 33.

(e) *Reynell v. Lovie*, 15 M. & W. 517; *Capp's case*, 1 Sim., N. S. 178. And see *Bright v. Hutton*, 3 House of Lords' Cases, 368, per Lord Wensleydale.

(f) See *Barker v. Sturt*, 3 C. B. 916;

*Bailey v. Mancaulay*, 13 Q. B. 815; *Nevins v. Henderson*, 5 Rail. Cas. 684.

(g) *Scott v. Lord Ebury*, L. R., 2 C. P. 255; 38 L. J., C. P. 161.

(h) See especially Mr. Warner's Evidence, Report, p. 40. As to Parliamentary practice generally, see May on the Law and Usage of Parliament, Will's Practice of the Referees' Court, Clifford and Stephens on the Practice of the Referees' Court.

Standing Orders of the two Houses, at one time very dissimilar, are now very much assimilated both in substance and arrangement (i).

By the privilege of the House of Commons, all bills which involve pecuniary charge upon the Queen's subjects originate in that House; and consequently railway bills were formerly passed first in the Commons. But in 1858 it was resolved by the Commons not to insist on its privileges with regard to any clauses in private bills sent down from the House of Lords, which refer to tolls and charges for services performed, and are not in the nature of a tax (j), so that railway bills may now originate in either House.

In which House railway bills originate.

At the commencement of each Session the Chairman of the Committee of Ways and Means seeks a conference with the Chairman of Committees of the House of Lords, for the purpose of determining in which House the respective bills should be first considered (k).

Decided on conference between chairmen of our committees.

It must be remarked, that no private bill can be brought into the House of Commons but upon a petition first presented, which has been duly deposited in the private bill office (l), and indorsed by one of the examiners, with a printed copy of the proposed bill annexed. And such petition must be signed by the suitors for the bill (m). In the House of Lords, however, railway bills are excepted from the rule which requires a petition to be presented for leave to bring in a private bill. But a printed copy of every railway bill, proposed to be introduced into either House, must be deposited in the office of the clerk of the Parliaments, on or before the 17th December (n).

Petition for bill in Commons.

Not in Lords.

We will now notice the principal preliminary matters required by the Standing Orders of both Houses, compliance with which must be proved before one of the examiners of petitions for private bills (o), before any railway bill can be introduced into either the House of Commons or the House of Lords. The requirements of these Standing Orders, which, except where specially noticed, are the same in both Houses, will be summarized in the following order:—

Standing Orders compliance with which must be proved before examiners.

- A. Notices by advertisement.
- B. Notices and applications to owners, &c. of lands and houses.
- C. Deposit of documents.
- D. Form of plans and books of reference.
- E. Estimates and deposit of money and declarations.

(i) The Standing Orders, so far as they affect railway bills, of the two Houses, are printed at length in vol. II., after the Statutes and Forms. Standing Orders 3 to 68 correspond in both Houses almost exactly. Standing Orders 112—132 of the Lords correspond to Nos. 153—170 of the Commons, with some variation between the two. The Introduction to Digby's "Standing Orders," which is published annually, shows concisely what

amendments have been made in each session.

(j) C. S. O. 228.

(k) C. S. O. 79.

(l) A list of petitions is there kept, in the order of their deposit, called "The General List of Petitions," and each petition is numbered. C. S. O. 220.

(m) C. S. O. 193.

(n) L. S. O. L. 32.

(o) C. S. O. 3—68; L. S. O. 3—68.

2. *Progress of Bill through Committee.*

Notices to state objects of application and powers intended to be applied for.

A. *Notices by Advertisement.*

It is required by the Standing Orders of both Houses (*p*), that in all cases where application is intended to be made for a bill relating to making, maintaining, varying, extending or enlarging any railway, notices shall be given stating the objects of the intended application, and the powers intended to be applied for; and if it be intended to apply for powers for the compulsory purchase of lands or houses, or for extending the time granted by any former act for that purpose, or for powers of amalgamation, sale or lease, or for powers to enter into working agreements or traffic arrangements, or to amend or repeal former acts; or to levy, alter or affect tolls, or to confer, vary or extinguish any other rights or privileges;—the notices shall specify such intention, and the whole of the notice relating to the same bill shall be included in the same advertisement, which shall be headed by a short title descriptive of the undertaking or bill.

Notices to contain names of parishes, &c.

These notices must contain a description of all the termini, together with the names of the parishes and places through which the work is intended to be made, maintained, varied, extended or enlarged, or in which any lands or houses intended to be taken are situate; and must also state the time and place of deposit of the plans, sections and books of reference (*q*).

Publication of notices in Gazette, and in newspapers.

They must be published in the Gazettes, and also in the local newspapers in the October and November (but not after the 27th November) preceding the application for the bill (*r*).

B. *Notices and Applications to Owners, &c.*

Application to owners, &c. on or before December 15.

On or before the 15th December preceding the application for the bill, application in writing must be made to the owners, lessees and occupiers of all lands and houses intended to be taken, or which may be taken as being within the limits of deviation defined upon the plan. The form of application, which is very explicit, requests the party to whom it is sent to signify his assent, dissent or neutrality on or before a day named (*s*). Separate lists must afterwards be made, distinguishing parties assenting, dissenting, signifying neutrality and

(*p*) C. S. O. 8; L. S. O. 3. C. S. O. 3 requires the notice to state the time at which copies of the bill will be deposited in the Private Bill Office.

(*q*) C. S. O. 4; L. S. O. 4. This order has been much altered in the issue of the present session.

(*r*) C. S. O. 9; L. S. O. 9.

(*s*) C. S. O. 11; L. S. O. 11. C. S. O. 19, and L. S. O. 19 require the notices to be accompanied by a copy of the Standing Orders regulating the time and mode of presenting petitions in opposition to bills.

## SECT. 2.—PROGRESS OF BILL THROUGH COMMONS.

returning no answer (*t*). If a work already authorized is intended to be relinquished, notice in writing must be given of the bill (*u*).

### *C. Deposit of Documents.*

On or before the 30th November, plans, books of reference and sections, accompanied by ordnance or published maps with the lines of railway delineated thereon, must be deposited for public inspection at the offices of the clerks of the peace of every county in England or Ireland, or in the offices of the principal sheriff clerks of every county in Scotland (*x*). And it is provided by a statute, of early date that these officials must receive and keep the documents, and permit inspection, under a penalty of five pounds, to be recovered in a summary way (*y*). Copies of all plans, books of reference and sections, accompanied by a map, must be deposited at the office of the Board of Trade (*z*), and the Private Bill Office (*v*). If the proposed work be on tidal lands, additional copies must be deposited at the office of the Harbour Department of the Board of Trade (*b*); and if any portion of the work be in the metropolis, or affect burial grounds, copies relating to such portion must be deposited at the office of the Metropolitan Board of Works or, Home Office, as the case may be (*c*).<sup>o</sup>

Deposit of plan &c. with clerk of the peace, &c.

Inspection of plans, 7 Will. 4 & 1 Vict. c. 61

Deposit of plan at public offices

It is further provided as follows:—

On or before the 30th day of November, a copy of so much of the said plans and sections as relates to each parish, in or through which the work is intended to be made, maintained, varied, extended or enlarged, or in which any lands or houses intended to be taken are situate, together with a copy of so much of the book of reference as relates to such parish, shall be deposited with the parish clerk of each such parish in England; or, in the case of any extra-parochial place, with the parish clerk of some parish immediately adjoining thereto; or, in case of any place within the limits of the metropolis, as defined by the "Metropolis Management Act, 1855," with the clerk of the vestry of each parish in Schedule A., and with the clerk of the district board of parishes in Schedule B. of the said act; with the session clerk of each such parish in Scotland, and in royal burghs with the town clerk; and with the clerk of the union within which such parish is included in Ireland (*d*).

Deposit of plans &c., with parish clerk, &c.

And the officials mentioned in this Order are bound by the statute 7 Will. 4 & 1 Vict. c. 83, above referred to, both to take such copies into their custody and to permit inspection of them.

On or before the 30th November, also, a copy of so much of the plans and sections as relates to any urban sanitary district in or through which the work is intended to be made, with a copy of so

Deposit of plan with clerk of sanitary authority.

(*t*) C. S. O. 12; L. S. O. 12, p. 982.  
(*u*) C. S. O. 16; L. S. O. 16. As to notice, on or before the 21st December, of alteration of provision for protection of owners, see C. S. O. 17; L. S. O. 17.

(*x*) C. S. O. 24; L. S. O. 24.

(*y*) 7 Will. 4 & 1 Vict. c. 83, p. 723.

(*z*) C. S. O. 27; L. S. O. 27.

(*v*) C. S. O. 25; L. S. O. 25, by which latter the copies must be deposited in the office of the Clerk of the Parliaments.

(*b*) C. S. O. 26; L. S. O. 26.

(*c*) C. S. O. 28, 30; L. S. O. 28, 30.

(*d*) C. S. O. 29; L. S. O. 29.

2. *Progress of Bill through Committee.*

Deposit of bill in Private Bill Office, &amp;c.

much of the book of reference as relates to that district, must be deposited with the clerk of the sanitary authority (e).

*On or before the 21st December*, a printed copy of the bill must be deposited in the Private Bill Office, where it is to be open to the inspection of all parties, and also in the office of the Board of Trade, at the Treasury, and at the Local Government Board. Bills affecting navigation must also be deposited at the Harbour Department of the Board of Trade; bills affecting burial grounds at the Home Office; bills authorizing any work within the metropolis at the office of the Metropolitan Board of Works (f); and bills affecting rivers having statutory conservators, at the office of such conservators (g).

Bills giving running powers.

If compulsory running powers are proposed to be taken over any railway, notice must be given of the bill to every company owning or working such railway (h).

Estimates, &amp;c.

*On or before the 31st December*, there must be also deposited in the Private Bill Office, or in the office of the Clerk of the Parliaments, as the case may be, all estimates, declarations and lists of owners, lessees, and occupiers which are required by the Standing Orders (i).

Declaration as to capital, &amp;c.

There must also be deposited in the Private Bill Office a declaration stating the following matters:—

1st. The present and proposed amount of the capital of the company.

2nd. The number of shares and the amount of each share.

3rd. The number of shares subscribed for.

4th. The amount of subscriptions paid up.

5th. The names, residences and descriptions of the shareholders or subscribers (so far as the same can be made out), and of the actual or provisional directors, treasurers, secretaries or other officer, if any.

And such documents must be verified by the signature of some authorized officer of the company or proposed company (if any), and by some responsible party promoting the bill; and copies of such declarations must be printed at the expense of the promoters, and delivered at the Vote Office for the use of the members of the House, and at the Private Bill Office for the use of any agent who may apply for the same (k).

Copies of estimate to be delivered at Vote Office and Private Bill Office.

Copies of the estimate of expense of the undertaking and, where a declaration and estimate of the probable amount of rates and duties are required, copies of such declaration and estimate, must be delivered

(e) C. S. O. 29 A.; L. S. O., 29 A.

(f) C. S. O. 32, 33, 34; L. S. O. 33, 34.  
post. By L. S. O. 32 a printed copy of the bill must be deposited in the office of the Clerk of the Parliaments, (where it does not appear to be open to public inspection)

on or before the 17th December.

(g) C. S. O. 34 A.; L. S. O. 34 A.

(h) C. S. O. 18; L. S. O. 18.

(i) C. S. O. 35; L. S. O. 35.

(k) C. S. O. 35 A.

at the Vote Office for the use of members, and at the Private Bill Office for the use of agents (*l*).

And where power is sought to take, either by agreement or compulsorily, in the metropolis twenty or more houses, or in any city, borough or other sanitary district ten houses or more occupied either as tenants or lodgers by persons belonging to the labouring classes, the promoters are required to deposit in the Private Bill Office in the case of a Commons' Bill or office of the Clerk of the Parliaments, in the case of a Lords' Bill, and at the Home Office or Local Government Board in either case, a statement of the number and situation of the houses, the number of persons residing therein, and a copy of so much of the plan as relates thereto (*m*).

Statement as to houses inhabited by labouring classes.

### D. Preparation of Plans, &c.

The Standing Orders describe with great particularity the form in which plans, books of reference, sections, and cross sections must be prepared.

The plan must be drawn to a scale of not less than four inches to a mile, and the limits of every lateral deviation are to be defined thereon. Enlarged plans are to be added of buildings in the line of the work, on a scale of not less than a quarter of an inch to every 100 feet, unless the whole of the plans be on such scale. Any proposed diversion of a public road or canal is to be distinctly marked. If a junction with an existing railway be intended, the course of such existing railway is to be shown for a distance of 800 yards on either side of the proposed junction (*n*).

The book of reference must contain the names of the owners, lessees and occupiers of all lands and houses in the line of the proposed work (*o*).

Book of reference.

The section must show the height of every embankment and the depth of every cutting. It must be drawn to the same horizontal scale as the plan, and to a vertical scale of not less than one inch to every 100 feet. Bridges, tunnels and level crossings must be particularly marked. If it be intended to form a junction with an existing or authorized railway, the gradient of such railway must be shown for a distance of 800 yards on either side of the point of junction (*p*).

Sections.

(*l*) C. S. O. 36; L. S. O. 36. C. S. O. 37, and L. S. O. 37, give the form of estimate. L. S. O. 36 requires these copies to be delivered at the office of the Clerk of the Parliaments.

(*m*) C. S. O. 38; L. S. O. 38. See also C. S. O. 183 A, and L. S. O. 111, vol. II., "Statutes," &c., by which the term "labouring classes" is defined, and every

bill is ordered to contain clauses obliging the company to provide new dwellings to the satisfaction of the central authority for the persons to be displaced.

(*n*) C. S. O. 40—44; L. S. O. 40—44.

(*o*) C. S. O. 46; L. S. O. 46.

(*p*) C. S. O. 47—55; L. S. O. 47—55.



2. Progress of Bill  
through Com-  
mons.

Estimate of ex-  
pense and de-  
posit of 5 per  
cent.

Custody, &c. of  
deposit, 9 & 10  
Vict. c. 20.

Return of  
deposit.

E. Estimates and Deposits.

An estimate of the expense of the undertaking must be prepared in any case (g). And in the case of a bill authorizing the construction of works by other than an existing railway which has paid dividends on its ordinary share capital, not less than five per cent. on the amount of this estimate must before the 15th of January be deposited with the Paymaster-General for the Supreme Court in England or with the Accountant-General of the Supreme Court in Ireland, according as the work is intended to be done in England or Ireland. If the work be in Scotland, the deposit may be made with the Paymaster-General for the Supreme Court in England or with the Queen's Remembrancer on behalf of the Court of Exchequer in Scotland, at the option of the promoters (r). It has been held, that the deposit need not be the actual property of the promoters (s). A statute passed in 1846 (t) provides for its custody, investment and repayment. By the second section of this act, the money is payable into the Banks of England or Ireland or a parliamentary Bank of Scotland. By the fourth section, the managing directors may present a petition to Chancery for an interim investment in £3 per Cent. Consols, or £3 per Cent. Reduced "or any Government security or securities." In a petition under the fourth section (u), Lord Romilly refused to treat the deposit as "cash under the control of the court," within the meaning of 23 & 24 Vict. c. 38, s. 10, and to allow it to be invested in any other securities than those specified by the statute; but Hall, V.-C., recently declined to follow that decision and allowed the deposit to be invested in India Stock (x). The petitioners will not be allowed to employ their own broker (y). By the fifth section, the deposit is to be repaid to the promoters, on petition to the court, at the termination of the session (z), on the certificate of the Speaker (a) or Chairman of Committees. If the work is to be made out of funds in hand or surplus revenue, a declaration stating the fact, with particulars, may be deposited, and in that case no deposit of money is required in respect of so

(g) C. S. O. 56; L. S. O. 56. As to depositing the estimate, see C. S. O. 35; L. S. O. 35.

(r) C. S. O. 57; L. S. O. 57, in pari materia, is slightly different.

(s) *Scott v. Oakley*, 10 L. T. 322; 33 L. J., Ch. 812.

(t) 9 & 10 Vict. c. 20, vol. II., "Statute," &c.

(u) *Ex parte Great Northern R. Co.*, L. R., 9 Eq. 271.

(x) *Re Southwold R. Co.*, L. R., 1 Ch. D. 697. This later decision perhaps proceeded on the authority of *Re Fryer's Settlement*, L. R., 20 Eq. 468; but it is

submitted that Lord Romilly's construction of the statute is the more correct one, for the reason that the general provisions of the later statute ought not to be construed to imply affect the specific provisions of the earlier one.

(y) *Re Bolton Tramways Act*, 34 L. T. 230, overruling *Ex parte West Riding, &c. R. Co.*, ib. 168.

(z) The hearing of such a petition is "vacation business." *Re Wigan Junction R. Co.*, L. R., 10 Ch. App. 541.

(a) Or Deputy Speaker, if necessary, *Ex parte Stockbridge Railway Bill*, L. R., 2 Eq. 864.

much of the estimate of expense as is provided for by the surplus funds (b).

The special act, however, frequently contains a section in obedience to the Standing Orders, and expressly overriding the general act, that if the line be not opened within five years, the parliamentary deposit shall be applied towards compensating persons whose land shall be interfered with or rendered less valuable by the "commencement, construction or abandonment" of the railway. These words must be read disjunctively (c) and include compensation for the breach of a collateral obligation to erect a station, but not for the breach of an obligation to put up fences (d). In the alternative, it is provided that the deposit be forfeited to the Crown, or be applied as assets for the benefit of "creditors," which expression means meritorious creditors, and does not include promoters or parliamentary agents (e). In the case of an extension act, it is provided that the deposit may be impounded as a security for the completion of the extension line.

Appropriation of deposit by special act.

When the time has expired for depositing the documents already specified, the parties interested can judge whether the Standing Orders have been complied with by the promoters; and if not, they may take advantage of any mistakes by preparing memorials complaining of such non-compliance, but they cannot in such memorial go into the principle of the bill (f). These memorials are addressed, in the Commons, "To the Examiner of Petitions for Private Bills," and in the Lords, "To the Examiner of Standing Orders for Private Bills," and are prepared in the same form and subject to the same general rules as petitions to the House as well as to other special rules (g).

Memorials complaining of non-compliance with Standing Orders.

How addressed.

#### *Proceedings before the Examiners.*

The examination of petitions for private bills commences on 18th January, in such order and subject to such regulations as are made by the Speaker (h). One of the examiners must give at least seven clear days' notice in the Private Bill Office of the day appointed for the examination of each petition (i), but practically

Examination of petitions.

Notice.

(b) C. S. O. 58; L. S. O. 58.

(c) See *Potteries, &c. R. Co., in re*, L. R., 25 Ch. D. 252, C. A.

(d) *Rathen R. Co., in re Hughes's Trustees, ex parte*, L. R., 32 Ch. D. 438; 56 L. J., Ch. 30; 55 L. T. 231; 34 W. R. 581, C. A.

(e) *Birmingham and Lichfield Junction R. Co., in re*, L. R., 28 Ch. D. 652; 61 L. J., Ch. 580; 52 L. T. 729; 33 W. R.

517, per Chitty, J.

(f) May, 9th ed. 778.

(g) See C. S. O. 69, et seq., and L. S. O. 69, et seq.

(h) C. S. O. 60. The last Speaker's regulations were made on 27th July, 1858, and may be found in Bristowe's *Private Bill Practice*, 2nd ed. p. 11.

(i) C. S. O. 70.

2. *Progress of Bill through Commons.*  
Daily lists.

much longer notice has been given (*k*). The clerks in the Private Bill Office prepare daily lists of all petitions upon which any examiner is appointed to sit, specifying the hour and place of meeting, and the list is hung up in the lobby of the House (*l*).

These lists are divided into opposed and unopposed cases, the latter being first disposed of (*m*). If the promoters do not appear when their petition is called on, it is struck off the general list of petitions and cannot be re-inserted except by order of the House (*n*). If the promoters appear, they must prove compliance with the Standing Orders of both Houses of Parliament, which may be done by affidavit (*o*); unless the examiner requires further evidence. And, as we have already seen, any parties who have presented a memorial are entitled to appear and be heard.

Dissenting propositions to be allowed to be heard.

Any proprietor in a company who may have dissented from the bill at a meeting called in pursuance of the "Wharnccliffe Order," may be heard by the examiner on memorial, or by the committee on the bill on petition. The memorial or petition must first be deposited in the Private Bill Office (*p*).

Statement of proofs.

A general statement of proofs will be required by the examiner and another copy by the committee clerk, comprising the Standing Orders of both Houses, and distinguishing any orders peculiar to either House by a reference to such orders in the margin. This general statement must be in the same form as the printed statement required for the House of Lords. There must also be a printed statement, in a form which may be obtained at the Queen's printers, of compliance with the Standing Orders of the House of Lords.

Examiner's certificate.

The examiner will certify by indorsement on the petition whether the Standing Orders have or have not been complied with. In the latter case he will report to the House the facts upon which his decision is founded (*q*). If he feels doubts as to the due construction of a Standing Order, he will make a special report of the facts without deciding (*r*).

Standing Orders not complied with.

If the examiner reports that the Standing Orders have not been complied with, his report is referred to the select committee on Standing Orders (*s*), who report to the House whether such Standing Orders ought or ought not to be dispensed with, and whether the parties should be allowed to proceed with the bill, and under what (if

(*k*) May, 774.

(*l*) C. S. O. 248.

(*m*) May, 774.

(*n*) C. S. O. 70.

(*o*) C. S. O. 76. This affidavit must be sworn in England before a Justice of the Peace or Commissioner for taking affidavits; in Scotland, before any sheriff deputy, or his substitute; in Ireland, before any judge, assistant barrister, or justice of

the peace.

(*p*) C. S. O. 75. The "Wharnccliffe Order" (see p. 17), which originated in the House of Lords (L. S. O. 62—65), has, since 1858, been adopted by the House of Commons (C. S. O. 62—65).

(*q*) C. S. O. 77; L. S. O. 84.

(*r*) C. S. O. 78; L. S. O. 78.

(*s*) C. S. O. 199; L. S. O. 88.

any) conditions (*t*). If their report is unfavourable, the bill is lost, and the promoters must begin *de novo* next session.

When the examiner certifies that the Standing Orders have been complied with, and indorses the petition to that effect, it is returned to the agent, who arranges for its presentation to the House of Commons by a member. Copies of the bill must be laid before the Chairman of the Committee of Ways and Means and the counsel to the Speaker, not later than the day after the examiner has indorsed the petition for the bill (*u*), and two clear days at least before the day appointed for the consideration of the bill by a committee (*x*). It is the duty of these two officers to examine the bill, and, if it be opposed, to call the attention of the chairman of the committee to all points which may appear to require it (*y*).

Standing Orders complied with.

Copies of bill.

With respect to the presentation of the petition for the bill, it is to be observed, that a bill is always entrusted to one or two members of the House, who attend at the sitting of the House, and make such motions as are necessary to forward its progress. The petition must be presented not later than three clear days after indorsement by the examiner, or if the House shall not be sitting, then not later than three clear days after the first sitting (*z*).

Petition for bill.

When the bill is ordered to be brought in, it is presented to the House, by depositing it in the Private Bill Office, and is laid on the table of the House for first reading (*a*). The bill must be printed, the short title corresponding with that at the head of the advertisement, and the proposed amount of all rates and tolls being inserted in *italics*. Printed copies must be delivered to the doorkeepers for the use of members before the first reading (*b*).

Bill presented.

Must be printed.

Copies.

The bill having passed the Standing Orders, is read a first and afterwards a second time (*c*).

Bill read first and second time.

It then stands referred to the general committee on railway and canal bills, who appoint from among themselves the chairman of each committee (*d*).

Interval between first and second reading.

No petition against the bill will be taken into consideration by the committee which does not distinctly specify the grounds on which the

Petition against bill must specify grounds of objection.

(*t*) C. S. O. 92; L. S. O. 83. As to petitions for dispensation with Standing Orders, see C. S. O. 200.

(*u*) C. S. O. 80.

(*x*) C. S. O. 82.

(*y*) C. S. O. 80.

(*z*) C. S. O. 195.

(*a*) C. S. O. 198.

(*b*) C. S. O. 201—3.

(*c*) It was provided by the Regulation of Railways Act, 1868, s. 35, that any bill conferring additional powers upon an

incorporated company should, before its second reading, be submitted to a meeting of shareholders; but this provision was shortly afterwards repealed by 32 & 33 Vict. c. 6, the Railway Companies Meetings Act, 1869. For the "Wharfedale Order," which applies in both Houses, see p. 17.

(*d*) C. S. O. 101. For the periods which must elapse between first and second reading, and between second reading and committee, see C. S. O. 204, 211.

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petitioners object to any of the provisions thereof, and the petitioners will only be heard on such grounds so stated (e).

Grouping bills.

The general committee on railway and canal bills may form into groups all railway and canal bills which, in their opinion, it may be expedient to submit to the same committee (f).

Declaration of  
members as to  
absence of inter-  
est.

Each member of the committee on an opposed bill or group of bills must sign a declaration that his constituents have no local interest, and that he has no personal interest in the bill, and that he will never vote on any question without having duly heard and attended to the evidence relating thereto (g).

The following order constitutes the Court of Referees:—

The Referees  
Court.

The Chairman of Ways and Means, with not less than three other persons who shall be appointed by Mr. Speaker for such period as he shall think fit, shall be referees of the House on private bills; such referees to form one or more courts; three at least to be required to constitute each court; provided that the chairman of any second court shall be a member of this House; and provided that no such referee, if he be a member of this House, shall receive any salary (h).

*Locus standi.*

Any question deemed suitable for reference by the committee may be referred to the referees (i), but their chief office is to decide questions of *locus standi*, i. e., questions arising upon the rights of petitioners to be heard in opposition to a bill (k). Five Standing Orders have been framed for their guidance in this matter. They

Competition.

may admit petitioners to be heard on the ground of "competition" if they think fit. The shareholders of a company promoting a bill may not be heard against it, unless their interests are distinct from those of the company. Shareholders who have dissented at a meeting called in pursuance of the "Wharnccliffe Order," \* and similar Orders, are entitled to be heard. Companies are entitled to be heard against bills which give running or like powers over their lines. Municipal authorities may be heard, if the referees think fit, against a bill which is alleged injuriously to affect their towns (l); and Chambers of Commerce or Agriculture, may, on petition against a bill, and if the referees think fit, be heard in relation not only to rates and fares proposed to be authorized, but to rates and fares already authorized by any existing act of the company promoting an extension bill (m).

Dissentient  
shareholders.  
\* See p. 17.

Chambers of  
Commerce and  
Agriculture.

(e) C. S. O. 128.  
(f) C. S. O. 103.  
(g) C. S. O. 113.  
(h) C. S. O. 87. See Will on the Practice of the Referees Court (A.D. 1866), and May, 9th ed., A.D. 1885; Cliford and Stephens on the same, A.D. 1870.  
(i) C. S. O. 90.

(k) C. S. O. 89.  
(l) C. S. O. 130—135. As to the power of municipal authorities, &c. to expend corporate funds in promoting or opposing bills, see 35 & 36 Vict. c. 91 (Leaman's Act).  
(m) C. S. O. 133 A.  
(n) 30 & 31 Vict. c. 136, vol. II., "Statutes," &c.

Duties of the greatest importance are imposed by the Standing Orders on the committee to which the bill may be referred. They are required to prevent the granting of certain powers, to insist on the introduction of certain clauses, and also to report specially upon many points specially mentioned for their consideration.

Duties of the committee.

Thus, it is provided that no railway company shall be authorized to borrow a larger sum than one-third of their capital, or to borrow at all, until half the capital be paid up (o).

Clauses prohibited.

The following order has for its object the preservation of competition by water :—

“No railway company shall be authorized to construct or enlarge, purchase or take on lease, or otherwise appropriate, any canal, dock, pier, harbour or ferry, or to acquire and use any steam-vessels for the conveyance of goods and passengers, or to apply any portion of their capital or revenue to other objects, distinct from the undertaking of a railway company, unless the committee on the bill report that such a restriction ought not to be enforced, with the reasons and facts upon which their opinion is founded” (z).

Railway Companies not to acquire docks, &c.

In like manner, restrictions are imposed upon the acquisition of powers of purchasing steam-vessels (g).

Level crossings over carriage roads or other railways are forbidden unless a report thereon from the Board of Trade be laid before the committee, and unless the committee, if they disagree with such report, recommend the crossing (r). There is a similar provision with respect to the alteration of the levels of roads beyond a certain limit (s).

Level crossings.

The Orders also require the insertion of clauses imposing heavy penalties upon a company failing to complete the railway within the period limited by the special act. If the company be already possessed of a railway open for public traffic, and has paid dividends during the preceding year upon its share capital, the penalty is to be 50% a day until either the railway be completed, or until the aggregate of the penalties amount to five per cent. on the estimated cost of the works. If the company be not possessed of a railway already open, or have not paid a dividend during the preceding year, the deposit is not to be returnable to the promoters until either the line be opened before the time limited, or the promoters prove to the satisfaction of the Board of Trade that one-half of the authorized capital has been paid up and expended for the purpose of the act. The penalties or deposit, as the case may be, are to be applicable towards compensating any landowners or other persons whose property may have been interfered with or otherwise rendered less valuable by the commencement, construction or abandonment of the railway. The period

Clauses required. Completion of railway.

(o) C. S. O. 153; L. S. O. 112.

(p) C. S. O. 156.

(q) C. S. O. 162; L. S. O. 121.

(r) C. S. O. 165; L. S. O. 113.

(s) C. S. O. 164; L. S. O. 108.

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limited is not to exceed five years in the case of a new railway line, and three years in the case of extension of time for completing a railway line. If the railway be not completed within the period limited the powers of the act are to cease to be exercised (*t*). Where, however, these provisions are not applicable, the committee may make "such other provision as they shall deem necessary for the completion of the line" (*u*).

The important subject of tolls is dealt with as follows:—

Committee to fix  
the tolls and  
charges.

The committee on every railway bill shall fix the tolls, and shall determine the maximum rates of charge for the conveyance of passengers, with a due amount of luggage and of goods on such railway, and such rates of charge shall include the tolls and the costs of locomotive power, and every other expense connected with the conveyance of passengers, with a due amount of luggage and of goods upon such railway; but if the committee shall not deem it expedient to determine such maximum rates of charge, a special report, explanatory of the grounds of their omitting so to do, shall be made to the House, which special report shall accompany the report of the bill (*x*).

Preference  
shareholders.

The rights of preference shareholders are to be carefully protected (*y*). No powers of purchase, sale, lease or amalgamation are to be granted without previous proof by the companies who are parties thereto that they have paid up, and expended for the purposes of their acts, one-half of their authorized capital (*z*). Clauses are to be inserted prohibiting the payment of interest on calls (*a*), and deposits out of capital (*b*); but the committee has a discretionary power to allow interest on calls subject to certain restrictions, the chief of which are that the interest must not exceed 4 per cent., and is to be paid only in respect of the time allowed for the completion of the line, and not allowed unless a certificate of the Board of Trade has been obtained that two-thirds at least of the share capital have been issued and accepted, and are held by shareholders legally liable (*c*). Any agreement for which parliamentary sanction is sought is to be printed in a schedule to the bill (*d*). Powers of purchasing steam-vessels are not to be given except when the transit by such vessels is required to connect portions of railway belonging to the company promoting the bill (*e*).

Interest on calls.

And the general control of the legislature over the railway is preserved by the following Standing Order, first passed in 1845:—

(*t*) C. S. O. 158; L. S. O. 114—116, 118.

(*u*) C. S. O. 158, *ad. fin.*; L. S. O. 118;

(*x*) C. S. O. 159; L. S. O. 119, in *pari materia*, does not contain the paragraph as to the special report.

(*y*) C. S. O. 160, 161; L. S. O. 120.

(*z*) C. S. O. 163; L. S. O. 122.

(*a*) C. S. O. 167; L. S. O. 123.

(*b*) C. S. O. 168; L. S. O. 123.

(*c*) C. S. O. 167; L. S. O. 123.

(*d*) C. S. O. 174. By L. S. O. 104, it is provided that such an agreement shall contain a clause declaring it to be subject to such alterations as Parliament may think fit to make.

(*e*) C. S. O. 162; L. S. O. 122; As to acquisition of docks, canals, &c., see C. S. O. 156.

The following clause shall be inserted in all railway bills passing through this House :—

Railway not to be exempt from any general act.

And be it further enacted, that nothing herein contained shall be deemed or construed to exempt the railway by this or the said recited acts authorized to be made, from the provisions of any general act relating to railways now in force, or which may hereafter pass during this or any future session of Parliament, or from any future revision and alteration, under the authority of Parliament, of the maximum rates of fares and charges authorized by this act [or by the said recited acts (f)].

The committee have no power to compel the appearance of witnesses before them, or the production of papers or records. Such evidence is usually produced by the promoters or opponents of the bill. It is usual, when the committee ascertain that such evidence cannot be procured without the interference of the House, to make a special report, and the House thereupon issues the necessary order. When witnesses are produced, however, the committee may examine them upon oath (g).

Evidence.

They may also receive affidavits in proof of compliance with such Standing Orders as are directed to be proved before them (h).

The preliminary question of *locus standi* of petitioners against the bill having been decided by the referees (i), and the committee having determined to proceed, the senior counsel for the bill opens the case, making particular reference to such provisions in the bill as are petitioned against; and, as the preamble to the bill is first considered, the observations are directed in support of the allegations contained in the preamble; but he is restricted to a statement of facts. Witnesses are also examined in support of the case which has been thus opened (k). This is also the period when evidence is adduced, to satisfy the committee, upon all the points upon which the committee are required to report specially to the House. The witnesses may be cross-examined by the counsel who appear in support of petitions against the preamble, but not by the counsel of parties who merely object to particular clauses in the bill (l). The witnesses may afterwards be re-examined in the usual manner; and when all the promoters' witnesses have been examined, then, if counsel are heard against the preamble, the senior counsel opens his case, and his witnesses are heard, cross-examined, and re-examined; and the counsel who appear for landowners, and other opponents, have the option of making their speeches either at the opening or

Proceedings before the committee in the Commons.

(f) C. S. O. 169; L. S. O. 132. The L. S. O. applies to tramways also.

(g) 21 & 22 Vict. c. 78, vol. II., "Statutes, &c."

(h) C. S. O. 142. These affidavits must be sworn in the same way as affidavits to be used before the examiners, ante, p. 10, note (u).

(i) See p. 12, ante, and C. S. O. 130 et seq., for rules laid down for the guidance

of the referees court upon this subject.

(k) As to proof of compliance with the Standing Orders, and of consents, see C. S. O. 142, 143.

(l) May, 9th ed. 858 et seq. It is not the practice to allow counsel to cross-examine who were not in the room when the witness was under examination in chief. May, 859.



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close of their evidence. If the petitioner's counsel state facts, or call evidence, the counsel for the bill is entitled to a reply on the whole case; otherwise the counsel for the bill is not entitled to a general reply. He may, however, comment on any cases cited in the argument on the other side. The committee then proceed to affirm or deny that the preamble has been proved. If the decision is in the affirmative, they go through the bill, clause by clause, and fill up blanks, and parties who object to particular clauses or who propose amendments are heard. New clauses may also be proposed by the parties or members of the committee after all the clauses are gone through. It is at this time also that officers of public departments sometimes appear to secure the insertion of clauses protective of the property or interests of the Crown, or concerning the public interests (*m*). The committee may now, also, refer questions in special cases to referees (*n*). But the referees merely act as assessors, and have no right to vote (*o*). If the committee report "Preamble not proved" or "Opposition unfounded," they may award costs (*p*). The bill must be printed as amended in committee (*q*). No consideration of the bill will take place unless the Chairman of the Committee of Ways and Means shall have informed the House or signified in writing to the Speaker whether the bill contain the several provisions required by the Standing Orders (*r*).

Referees may  
not vote.  
Report of Com-  
mittee,  
Costs.

Offering of  
clauses on con-  
sideration.

Recommittal.

When any clause or amendment is offered on the consideration of the bill, it must be printed at the expense of the parties; and when any clause is proposed to be amended, the nature of the amendment must be distinctly shown (*s*). If the bill be recommitted, it is referred to the former committee, and one clear day's notice must be given by the agents to the clerks in the Private Bill Office of the day and hour appointed for the meeting of the committee (*t*), and a filled up bill as proposed to be submitted to the committee on recommitment must be deposited in the Private Bill Office two clear days before the meeting of the committee, and a copy of the amendments must be furnished by the promoters to the parties petitioning against the bill (*u*). Amendments made on the consideration of the bill are entered upon the printed copy of the bill as amended in committee (*x*). The bill is then ordered to be read a third time, of which one clear day's notice must be given by the agent to the Private Bill Office (*y*). After it is read a third time, it is printed fair (*z*), examined

(*m*) May, 86.

(*n*) C. S. O. 90.

(*o*) Report of Select Committee, 1878.

(*p*) 28 & 29 Vict. c. 27, vol. II., "Statutes," &c.

(*q*) C. S. O. 214.

(*r*) C. S. O. 215. See these provisions, C. S. O. 153—170, p. 13, ante.

(*s*) C. S. O. 217. The amendment must first be submitted to the Chairman of Ways and Means; C. S. O. 85.

(*t*) C. S. O. 236.

(*u*) C. S. O. 237.

(*x*) C. S. O. 244.

(*y*) C. S. O. 243.

by the clerks in the Private Bill Office, certified by them (u), and sent to the Lords.

### 3. *Progress of the Bill through the House of Lords (h).*

*h. Progress of Bill through Lords.*

Before proceeding to trace the bill through the Lords, it is necessary to call attention to the important provision that whenever during the progress of the bill through the Commons, any alteration has been made in any work authorized by the bill, a plan and section of the alteration must be deposited with the clerks of the peace and other officials with whom the original plan was required to be deposited; that the intention to make the alteration has been published in the Gazette and local newspapers, and that the consent of owners has been obtained to the making of the alteration (e).

*Notice, &c. where alteration in Commons.*

Moreover, in compliance with the "Wharfedale Order," if the bill be promoted by a company already constituted by Act of Parliament, it is, after the first reading, referred to the examiners, who are to report, "As to compliance or non-compliance with the following order," which order prescribes—

*"Wharfedale Order." Bill promoted by existing company must be submitted to share holders.*

- (1.) Submission of the bill to proprietors at a special meeting;
- (2.) Calling of such meeting by advertisement both in metropolitan and local newspapers, and by circulars inclosing unstamped forms of proxy;
- (3.) Holding of the meeting not earlier than the seventh day after the last insertion of the advertisement;
- (4.) Approval of bill by proprietors (d), present in person or by proxy, holding at least three-fourths of the paid-up capital of the company represented at the meeting;
- (5.) Deposit, in the office of Clerk of the Parliaments, of a statement of the number of votes, if a poll was taken (e).
- (6.) Recording by the company of the names of the proprietors present in person at the meeting.

(a) C. S. O. 245.

(b) Three printed copies of the bill must be lodged by the agent for the bill with the principal assistant committee clerk, on the morning of the day on which the bill is introduced into the Lords.

(c) L. S. O. 61, post. C. S. O. 61 contains a similar provision as to bills brought from the Commons. As to deposit of the original plan, see L. S. O. 24; C. S. O. 24.

(d) Proprietors dissenting will be heard by the examiner on compliance with Standing Orders, on memorial deposited, with two copies, in the office of the Clerk

of the Parliaments before noon of the day preceding that appointed for the examination; or, on petition to the House, by the committee. L. S. O. 74, 75, 105.

(e) L. S. O. 62. This is known as the Wharfedale Order, and C. S. O. 62, with the exception of the last paragraph, is identical therewith. A railway company cannot bind themselves by a covenant not to oppose a bill which, if passed, would deprive the shareholders of the protection afforded by this order. *Mansell v. Midland Great Western (of Ireland) R. Co.*, 32 L. J. (Chanc.) 513; 1 Hemm. & Mill. 130.

*3. Progress of Bill through Lords.*

(7.) So far as the bill relates to a separate undertaking as distinct from the general undertaking, separate meetings of the proprietors of the company and of the separate undertaking.

Bill promoted by existing company and materially altered in Commons must be again submitted to that House.

Similarly, in the case of a bill brought from the House of Commons in which (1) provisions have been inserted in that House, empowering the promoters, being a company already incorporated, to execute, undertake or contribute towards any work other than that for which it was originally established, or to confer powers of sale, lease, entry into a working agreement, amalgamation, purchase, abandonment or dissolution; or (2) in which any such provisions originally contained in the bill have been materially altered in the House of Commons; or (3) in which any such powers are conferred on any company not being the promoters of the bill, the examiner has to report "as to compliance or non-compliance with the following order"—which order prescribes the submission of the bill to a meeting of proprietors in terms precisely identical with those of Order 62, above referred to (*f*).

The consent of directors named in the bill must be proved before the examiners (*g*).

Let us now proceed to trace the bill through the House of Lords.

No petition necessary

It is not necessary to present to the House of Lords any petition for leave to bring in a railway bill sent up from the Commons (*h*).

By the practice of the House of Lords, copies of the bill as originally introduced, and also as proposed to be submitted to the committee on the bill in the Commons, are laid before the Chairman of the Lords' Committees and his Counsel, so that a simultaneous examination of the bill is proceeding in both Houses. This course enables the promoters to embody amendments suggested in the Lords before the bill has passed the Commons, and greatly facilitates the passage of the bill through the Lords.

First reading.

When the bill is introduced into the Lords, it is read a first time; and not later than two days after the bill is read a first time, a copy of the bill as brought into the Lords must be deposited at the office of the Board of Trade (*i*).

If any alteration has been made in the Commons "in any work authorized by the bill," proof must be given before the Examiners that a plan and section of the alteration has been deposited in the office of the Clerk of the Parliaments, and with the clerks of the peace; that a copy of the plan has been deposited with the parish

(*f*) L. S. O. 64. The corresponding Commons Order is C. S. O. 64.

(*g*) L. S. O. 68; C. S. O. 68. Under these orders it will be observed that the

signatures only require to be proved in the second House.

(*h*) See L. S. O. 143, 149.

(*i*) L. S. O. 60; C. S. O. 60.

clerks two weeks before the introduction of the bill into the House of Lords, that the intention to make the alteration has been advertised, and that application has been made to, and the consent obtained of, owners, &c. to the making of the alteration (k).

Every railway bill brought from the Commons is after the first reading referred to the Examiners, before whom compliance with such Standing Orders as have not been previously inquired into must be proved. The Examiner must give at least two clear days' notice of the day on which the bill will be examined. Memorials complaining of non-compliance with Standing Orders must be deposited in the office of the Clerk of the Parliaments, with two copies thereof, before noon of the day preceding that appointed for the examination of the bill (l).

After first reading, referred to Examiner.

The Examiner certifies as to whether or not the Standing Orders have been complied with, and makes a special report if necessary (m). The Standing Orders Committee (which is appointed at the commencement of every Session, and consists of forty Lords, besides the Chairman of Committees, who is always Chairman of Standing Orders Committee, three of whom are a quorum) reports to the House whether the Standing Orders ought or ought not to be dispensed with, and in the case of a special report of the Examiner, whether or not they have been complied with, or whether they should be dispensed with (n).

No petition against the bill will be received unless it be deposited in the Private Bill Office before 3 p.m. on or before the seventh day after the day on which such bill has been read a second (o) time (p).

Petitions against bill.

The bill will not be read a second time earlier than the fourth day nor later than the seventh day after the first reading, unless the Examiners have certified that the Standing Orders have not been complied with, in which case the second reading is not later than the second day on which the House shall sit after the report from the Standing Orders Committee allowing the bill to proceed has been laid on the table of the House (q).

Second reading.

Moreover, no bill which proposes to increase maximum rates may be read a second time until a report from the Board of Trade on the subject has been laid on the table of the House (r).

Increase of fares, L. S. O. 90.

The second reading, as in the Commons, affirms the principle of the bill, subject to proof of the preamble before the committee, and is immediately followed by the commitment. If opposed, it is referred

Commitment

(k) L. S. O. 61.

(l) L. S. O. 75.

(m) L. S. O. 76, 78.

(n) L. S. O. 80—85, and see ib. as to proceedings before Standing Orders Committee.

(o) Or first time if the bill be brought up from the Commons; L. S. O. 93.

(p) L. S. O. 92.

(q) L. S. O. 91.

(r) L. S. O. 90.

*Progress of Bill  
through Lords.*

to a select committee of five Lords. The proceedings before the committee are similar to those adopted in the Commons.

*Duties of committee.*

In addition to the general inquiries before the committee, they are ordered to observe that particular provisions are inserted for restricting loans or mortgages, for maintaining the levels of roads, and for restraining the crossing of roads on a level. They are also required to observe the same rules and introduce the same clauses and provisions as in the Commons, relative to the non-payment of interest on calls or deposits out of capital, and the financial arrangements of companies in cases of purchase and amalgamation (*s*). These provisions, however, being included in the bill as brought from the Commons, need not be further noticed here. It is also required that in every railway bill the following clause be inserted:—

*Election of directors in railway companies.*

The directors appointed by this act shall continue in office until the first ordinary meeting to be held after the passing of the act, and at such meeting the shareholders present, personally or by proxy, may either continue in office the directors appointed by this act, or any number of them, or may elect a new body of directors, or directors to supply the places of those not continued in office, the directors appointed by this act being eligible as members of such new body (*t*).

Any report on the bill by a public department is referred to the committee on the bill (*u*).

*Amendments in committee.*

If any amendments have been made in committee, the bill must be reprinted as amended previously to the third reading, unless the Chairman of the Committee certify that the reprinting is unnecessary (*v*); and a copy of the bill as amended must be deposited in the office of the Board of Trade three days before the third reading. Proof of compliance with this order is given by depositing a certificate from the said Board in the Private Bill Office (*y*). The Chairman of Committees may, if he think fit, propose to the House that any railway bill shall, after it has been reported, be committed to a committee of the whole House, in which case such bill, printed as reported, must be delivered by the promoters to the Lords at least two days before the day for which it is committed (*z*). No amendment can be moved on the report or on the third reading, unless the same has been submitted to the Chairman of Committees, and, unless he considers the amendments verbal, printed copies thereof deposited with the Clerk of the Parliament, one clear day at least prior to the report or third reading (*a*).

*Amendment on report on third reading.*

The bill is now read a third time, and is ready to receive the Royal Assent.

(*y*) L. S. O. 108—129.

(*f*) L. S. O. 130

(*u*) L. S. O. 106.

(*z*) L. S. O. 145.

(*y*) L. S. O. 143.

(*z*) L. S. O. 142.

(*u*) L. S. O. 144.

4. *On Costs incurred in Parliament and Taxation of Costs (b).*

4. *Taxation of Costs.*

The payment of costs incurred in Parliament is chiefly regulated by the Act 28 & 29 Vict. c. 27, which is printed in Vol. II. The effect of this Act is that, when a committee report "Preamble not proved," the costs fall upon the promoters of the bill, but that when a committee report unanimously "Opposition unfounded," the costs fall upon the opponents. It is expressly provided, however, by s. 2 that "no landowner who *bond fide* at his own sole risk and charges opposes a bill which proposes to take any portion of the said petitioner's property for the purposes of the bill shall be liable to any costs in respect of his opposition to such bill."

By whom costs paid.

A tenant for life cannot charge the costs of opposing, much less of promoting, any bill, upon the settled estate; all such costs must come out of his own pockets (c).

Tenant for life may not charge costs on estate.

The bills of costs of Parliamentary agents, solicitors and others, in respect of railway bills and expenses incurred in complying with the Standing Orders, and in preparing, bringing in, and carrying such bills through, or in opposing the same, in either House of Parliament, are subject to certain statutory regulations. The stat. 10 & 11 Vict. c. 69, regulates the taxation of such bills in the House of Commons, and the 12 & 13 Vict. c. 78, in the House of Lords (d). The following is a brief summary of the contents of these statutes, which repealed the former statutes relating to the taxation of costs in Parliament (e). Costs incurred in the House of Commons (f) or the House of Lords (g) cannot be recovered by action, until one month after a signed bill of costs has been sent or delivered to the party charged. But a judge may dispense with such month's notice, upon proof that the party charged is about to quit the United Kingdom. The Speaker of the House of Commons (h), and the Clerk of the Parliaments, or in his absence the Clerk Assistant of the House of Lords (i), appoint the taxing officers in the respective Houses.

The Speaker of the House of Commons (k) and the Clerk of the Parliaments, or his Assistant in the House of Lords (l), may from

(b) See Webster's Parliamentary Costs. As to costs awarded by a committee of either House, see 28 & 29 Vict. c. 27, vol. 2; and as to costs awarded by the Court of Referees, see 30 & 31 Vict. c. 136, vol. II. Costs relating to railway bills are taxed during the session and on and after the third Monday in November. See Appendix to L. S. O.

(c) See *Earl of Derby's Will*, L. R. 10 Ch. 56.

(d) See vol. II. for both statutes.

(e) 6 Geo. 4, c. 123, in the Commons; 7 & 8 Geo. 4, c. 64, in the Lords.

(f) 10 & 11 Vict. c. 69, s. 2, post, Appendix.

(g) 12 & 13 Vict. c. 78, s. 2.

(h) 10 & 11 Vict. c. 69, s. 3.

(i) 12 & 13 Vict. c. 78, s. 3.

(k) 10 & 11 Vict. c. 69, s. 4 to 7, post, vol. II. By a resolution of 16th February, 1864, the Speaker was requested to revise the list of charges for Parliamentary agents, solicitors and others, with a view especially to the reduction of the charges allowed for copies of documents.

(l) 12 & 13 Vict. c. 78, s. 4 to 7, post, vol. II.

4. Taxation of Costs.

time to time prepare lists of charges to be allowed upon taxation of bills of costs in their respective Houses (*m*), and the taxing officer may examine parties and witnesses upon oath, and call for the production of books or writings in the hands of any party to such taxation, and the taxing officer may also receive fees for his services, and award the costs of the taxation against either party thereto, as he may think fit.

Upon the application of any party, upon whom a demand of Parliamentary costs incurred in the Commons (*n*), or in the Lords (*o*), has been made, or upon the application of the party sending in such demand of costs, the taxing officers, upon receiving a true copy of the bill, which shall have been duly delivered as aforesaid, must proceed to tax and settle the same, and in the absence of either party they may proceed *ex parte*; and actions brought to recover the bill pending the taxation must be stayed until the amount of the bill has been duly certified by the Speaker, or Clerk of the Parliaments, or Clerk's Assistant. But no application to tax can be entertained by the taxing officers, after a verdict has been obtained for the recovery of the bill of costs, or after the expiration of six months after the bill shall have been delivered: although in the latter case, upon a report of special circumstances, the taxing officer may be directed to tax the bill.

The taxing officer, on the direction of either party, is required to report to the Speaker of the Commons (*p*), or to the Clerk of the Parliaments, or his Assistant in the House of Lords (*q*), respecting the amount of the taxation and the costs thereof, and within twenty-one days either party may complain of the report, and the Speaker, or Clerk of the Parliaments, or his Assistant, as the case may be, may require a further report from the taxing officer: and when the matters have been finally disposed of, a certificate is issued of the amount ascertained to be due, which is binding and conclusive on the parties; and in any action or other proceeding brought for the recovery of the amount so certified, the certificate has the effect of a warrant of attorney to confess judgment; but it is provided that if the defendant in any action shall have pleaded that he is not liable to the payment of the said costs, the certificate shall be conclusive as to the amount thereof which shall be payable by such defendant, only in case the plaintiff shall in such action recover the same (*r*).

(*m*) For tables now (for Session of 1889) in force, see vol. II.

(*n*) 10 & 11 Vict. c. 69, s. 8.

(*o*) 12 & 13 Vict. c. 78, s. 8.

(*p*) 10 & 11 Vict. c. 69, s. 9.

(*q*) 12 & 13 Vict. c. 78, s. 9.

(*r*) The object of this proviso is to

enable parties charged with Parliamentary costs to deny their liability to pay them. See a similar provision in 6 & 7 Vict. c. 73, s. 43, where parties are allowed to dispute the retainer, after the costs have been taxed in the common law courts.

If any bill of costs in either House of Parliament comprises any charges incurred in respect of a private bill, but not taxable by the act, in pursuance whereof such bill may come to be taxed, the taxing officer of the House of Lords, or of the House of Commons, as the case may be, may tax such costs himself, or request the taxing officer of the other House of Parliament, or the proper officer of any other Court, to assist him in taxing any part of such bill; and the officer so requested to tax has the same power, and may receive the same fees, as upon a reference from the Court of which he is such officer, and the report and certificate shall include the amount of such last-mentioned fees and expenses. And, lastly, the taxing-master of either House of Parliament may take an account between the parties to any taxation of all sums of money paid or received in respect of any bill of costs, which is the subject of taxation (s).

(s) 12 & 13 Vict. c. 78, ss. 10, 11, 12, *post*, vol. II.



## CHAPTER II.

ON THE CONSTITUTION OF RAILWAY COMPANIES AND THEIR  
POWERS.

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1. The Consolidation Acts.1. *The Consolidation Acts.*

Before 1845, each special act was complete in itself

The Consolidation Acts relating to railways in England and Ireland.

THE railways established in this kingdom are, in the theory of the law, public highways, like the ancient roads which they have almost superseded (a). Their origin is, however, different, for these modern roads have been formed by private enterprise alone (b), and their management is entrusted, by the Legislature, to joint-stock companies whose powers are derived from Acts of Parliament, obtained, as we have seen, for the purpose of establishing each particular line of railway. When the earliest railways were made, each act was, like the old turnpike special acts, complete in itself, and contained the necessary powers for making, maintaining and managing the particular railway. It was afterwards thought desirable, "as well for the purpose of avoiding the necessity of repeating" the necessary provisions, as for ensuring greater uniformity in the provisions themselves," that one code should, as far as it was practicable, be applicable to all such undertakings. This was carried into effect by certain Acts of Parliament passed in 1845; and, as many of the earlier companies have been brought under this code, upon their subsequent applications for further powers from Parliament, it may be said that the greater number of existing companies are subject to its provisions as contained in these acts. They are three in number: The Companies Clauses Consolidation Act, 1845; The Lands Clauses

(a) See ch. xii., sec. 1, post.

(b) But by 12 & 13 Vict. c. 62, half a million sterling was advanced, by way of loan out of the consolidated fund to make

the Midland Great Western Railway in Ireland. See also the Railway Companies (Ireland) Temporary Advances Acts, 1866, 1867, and 1868. \* \*

Consolidation Act, 1845; and the Railway Clauses Consolidation Act, 1845. Additional acts of a similar nature are, The Companies Clauses Act, 1863; The Companies Clauses Act, 1869; The Lands Clauses Act, 1860; and The Railways Clauses Act, 1863.

The Companies Clauses Consolidation Act of 1845 (8 Vict. c. 16) Companies Clauses Act. is concerned with the distribution of capital into shares (ss. 6—13), the transfer and forfeiture of shares (ss. 14—37), the borrowing of money on mortgage or bond (ss. 38—55), the exercise of the right of voting by shareholders (ss. 66—80), the appointment, powers and liabilities of directors (ss. 81—100), and the declaration of dividends (ss. 120—123). The Companies Clauses Act of 1863 (26 & 27 Vict. c. 118), relates to the cancellation and surrender of shares (Pt. I. ss. 3—11), and to the creation of additional capital and debenture stock (Pt. II. ss. 12—21; Pt. III. ss. 22—35). And the Companies Clauses Act of 1869 (32 & 33 Vict. c. 48) amended that of 1863 as to the raising of debenture stock (e).

The Lands Clauses Consolidation Act of 1845 (8 Vict. c. 18) relates Lands Clauses Act. to the purchase of land by agreement and under the compulsory powers (ss. 6—68), the application of compensation money (ss. 69—80), the entry upon lands by the company (ss. 84—92), the sale of superfluous land (ss. 127—129), and similar matters. The Lands Clauses Act of 1860 (23 & 24 Vict. c. 106) amended that of 1845 as to the purchase of land by a rent-charge. And the Lands Clauses Act of 1869 (32 & 33 Vict. c. 18) further amended the Act of 1845 as to taxation of costs in arbitrations.

The Railways Clauses Consolidation Act of 1845 (8 Vict. c. 20) Railways Clauses Act. is concerned with the construction of the railway (ss. 6—29), the crossing of roads (ss. 46—67), the construction of accommodation works (ss. 68—75), the working of mines (ss. 77—85), and the carrying of passengers and goods and the taking of tolls (ss. 86—107). The Railways Clauses Act of 1863 (26 & 27 Vict. c. 92) relates to level crossings (ss. 5—8), the management of junctions (ss. 9—12), the protection of navigation (ss. 13—19), working agreements (ss. 22—29), exercise of powers as to steam vessels (ss. 30—35), and amalgamation (ss. 36—55).

As the titles of these acts indicate, they relate to three principal objects (d);—1. The constitution of Railway Companies, and their

(c) The amendments, however, had been anticipated, so far as railway companies were concerned, by ss. 27—30 of the Railway Companies Act, 1867, 30 & 31 Vict. c. 127.

(d) The Lands and Companies Clauses Acts are applicable to Companies established for other public undertakings as well as railways. It will be observed that

neither the Companies Clauses Act of 1869, nor the Lands Clauses Act of 1860 or 1869, are "Consolidation Clauses Acts" in the same sense as the others are. There is this difference between the Acts of 1845 and those of 1863, that whereas the Acts of 1845 are incorporated with the special acts, except as expressly varied (s. 1), the Acts of 1863 require a particular clause

1. *The Consolidation Acts.*

powers. 2. The rights of shareholders and others, who invest the necessary capital, and thus enable the directors to carry on the business of the company. 3. The powers of the company—to take and purchase lands for the purpose of constructing the railway, and works connected therewith. It is, therefore, proposed to treat, in order, on these three subjects, reserving for separate consideration any other branches of our inquiry which may be deserving of notice.

But before we proceed with this investigation, it may be useful to give a summary of the contents of a Railway Act, as it is usually framed since the Consolidation Acts have come into operation.

2. *The Special Act.*2. *Usual Provisions of a Special Act.*

## Incorporation of Consolidation Acts.

## Usual contents of special act

## Limited liability of shareholders.

## Directors.

Each particular railway act is called "the special act" (e). The special act, after reciting in the preamble that the formation of the proposed railway would be of great public advantage, proceeds to incorporate (f) the three Consolidation Acts of 1845 before referred to, and other acts of a similar nature, save as to such parts thereof as may be modified by, or be inconsistent with, the provisions of the special act. The act then incorporates A. B., C. D., E. F., and "all other persons who have subscribed or shall subscribe to the undertaking," as *a body corporate*, with perpetual succession, with power to purchase and hold lands, within the restrictions therein and in the Consolidation Acts contained. The amount of the capital to be raised is then declared, and the mode of making the calls prescribed. It is also provided that no shareholder of the company shall be liable for, or charged with, the payment of any debt or demand due from the company beyond the extent of his share in the capital of the company not then paid up; and limited powers are given to raise money on mortgage or on bond, provided a certain specified amount of the capital be subscribed and paid up. The number and qualification of directors is prescribed, and sometimes a power of removal for misconduct is given. The first directors of the company are appointed by name "to continue in office until the first ordinary meeting held after the passing of the act." The company are empowered, by exercising the powers in the statute, to make and maintain the railway and works, on the lands delineated and described in the parliamentary plans and book of reference, and the line of the railway is pointed out. Any special provisions are then inserted. The quantity of land which may be taken for extraordinary purposes is defined, and also the period within which lands

each special act to accomplish the incorporation. See the opening section of each Part of those Acts respectively.

(e) See 8 Vict. c. 16, s. 2.

(f) This is usual, but quite unnecessary. See note (d), *supra*.

are to be purchased. A certain time, very seldom exceeding five years (g), is prescribed for the completion of the railway. The tolls which may be taken are then specified, and a maximum rate of charges, for passengers and goods, is inserted. A power enabling the company to lease or sell the railway is sometimes added.

Completion of railway.  
Tolls.

It is invariably provided, in conformity with the standing orders (h), that the provisions of all existing or future general railway acts shall be in force in respect to the railway and company.

Saving for future general acts.

The 65th section of the Companies Clauses Act directs that the capital of the company "shall be applied, firstly, in paying the costs and expenses incurred in obtaining the special act." In addition to this, the special act itself almost always contains a clause that "all costs and charges of and incident to the preparing for, obtaining and passing the act, or otherwise in relation thereto," shall be borne by the company. But the effect of such a clause may be avoided by special agreement (i), if there be ample evidence of it, and if the agreement has been made with the promoters as agents for the company, that the company when incorporated shall not be liable. An agreement with individual promoters for their own protection is not sufficient to avoid the effect of the clause (k). Where six railways, parts of a system, were projected by the same person, and an act was obtained authorizing the construction of two only, and providing that the costs of the act and "incidental and preparatory thereto" should be paid by the company, it was held that the costs incurred in relation to the other four railways were payable by the company (l). But money agreed to be paid to a landowner to withdraw opposition to the bill is no part of the costs of the special act (m). A clerk to a promoter, who has looked only to the promoters for payment, cannot claim against the company; he must claim against the promoters, and they against the company (n).

(Costs of special act.)

As soon as the special act is obtained, the money deposited in the Bank of England, in pursuance of the Standing Orders in Parliament, may be withdrawn, on the petition of the parties in whose name the money is standing (o), subject, nevertheless, to the im-

Withdrawal of deposit.

(g) See L. S. O. 107, by which the period for the completion of a railway "shall not exceed, in the case of a new railway, five years, and in the case of extension of time for the completion of any railway, three years."

(h) U. S. O. 169; L. S. O. 132, post, vol. II.

(i) *Savin v. Hullake R. Co.*, 35 L. J., Ex. 52; L. R., 1 Ex. 9; 4 H. & C. 67; *Burden v. River Fergus Navigation Co.*, 2 Ir. R., C. L. 13.

(k) *Re Brampton & Longton R. Co.*, L. R., 10 Ch. App. 177; affirming *Bacon*,

V.-C. As to costs where a railway has been abandoned, see *ib.* and L. R., 10 Eq. 613; *Re Kensington Station Act*, L. R., 20 Eq. 197.

(l) *Re Tiltard*, 32 L. J., Ch. 156, 174; 8 L. T. 587.

(m) *Shrewsbury (Earl of) v. North Staffordshire R. Co.*, L. R. 1. Eq. 593; 35 L. J., Ch. 150, 171.

(n) *Kent Tramways Co., in re (C. A.)*, L. R. 12 Ch. D. 312.

(o) See 9 & 10 Vict. c. 20, and cases thereon, p. 8, ante. The petition is presented to the Chancery Division of the

2. *The Special Act.*

portant clauses inserted in pursuance of the Standing Orders, which provide for the impounding of the deposit as a security for the completion of the line, and the application of it in compensation to parties injured by the line not being completed within the time limited.

Access to special act.

The Railways Clauses Consolidation Act (sect. 162), requires each company to keep a Queen's printer's copy of their special act at their head office, and also to deposit copies with the clerks of the peace of the several counties into which the works extend. The penalty on the company for not depositing such copies is 20*l.* and 5*l.* for each day afterwards, and the clerks of the peace are bound to permit persons interested to inspect and copy the acts under penalties set forth in 7 Will. 4 & 1 Vict. c. 83. An exactly similar provision is contained in the Companies Clauses Consolidation Act (sect. 161), and in the Land Clauses Consolidation Act, (sect. 150).

3. *Meetings of Shareholders.*

Ordinary meetings.

C. C. Act, s. 66.

Extraordinary meetings.

• 3. *Meetings of Shareholders.*

The Companies Clauses Consolidation Act, 1845 (*p*), provides that two meetings of shareholders, called "*ordinary meetings*," shall be held every year: (Sect. 66 (*q*).) And no matters, except such as are appointed to be done at an ordinary meeting, may be transacted, unless special notice of such matters have been given in the advertisement convening such meeting: (Sect. 67.) Every general meeting of shareholders other than an ordinary meeting, is called "*an extraordinary meeting*," and may be convened by the directors as they think fit: (Sect. 68.) But only such business as was mentioned in the notice which convened the meeting can be entered upon: (Sect. 69.) A certain number of shareholders (*r*) may also

High Court, and the court will order payment to be made to the bankers of the company, if such be the prayer of the petition. *Ex parte Warwick and Leamington R. Co.*, 13 Sim. 31. Injunctions are sometimes granted to restrain parties from obtaining these deposits. See *Christie v. De Burgh*, 15 L. J., Ch. 125; *Gilbert v. Cooper*, 10 Jur., Ch. 580; *Goodman v. De Beauvoir*, *ibid.* 938. As to payment of deposit upon insolvency of company, see *De Bradford Tramways Co.*, 21 W. R. 815.

(*p*) 8 Vict. c. 16. This and all other statutes of importance noticed in the text are printed at length in vol. II., in chronological order.

(*q*) Where a company desire to make new provisions or to alter any of the provisions of their special act or of the Companies Clauses Consolidation Act, 1845, with respect to general meetings of

the company and the exercise of the right of voting by shareholders, they may obtain a certificate from the Board of Trade for that purpose under the Railway Companies Powers Act, 1861, 27 & 28 Vict. c. 120. See the Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 38, which section would seem to be unaffected by the Powers Amendment Act of 1870, 33 & 34 Vict. c. 19, on the principle applied in *Rey. v. Smith*, 13 H. 8 Q. B. 148, that where of three successive statutes the second incorporates the first, and the third repeals the first without reference to the second, the first remains in full force so far as the second is concerned.

(*r*) If, from any circumstances an exact compliance with the terms of the statute is impossible, it seems that these and similar provisions will be considered as directory only. See *Poss. v. Harbottle*, 2 Harc. 496.

require an extraordinary meeting to be held, by sending a requisition to the directors, who are thereupon required to convene the meeting; or on their default, the requisitionists may call such meeting: (Sect. 70.) Fourteen days' (s) public notice, at the least, of all meetings, ordinary and extraordinary, must be given in the form prescribed; and every notice of an extraordinary meeting, or of certain ordinary meetings particularly mentioned, must specify the purpose for which such meeting is called (t): (Sect. 71.)

Notice of meetings.

The scope of these and other sections was much considered in *Isle of Wight R. Co. v. Taborlin* (u). In that case certain shareholders called upon the directors to call an extraordinary meeting to appoint a committee of inquiry, and to empower such committee to concentrate offices and do other things to remove any of the directors, and to elect others. The directors called a meeting to discuss only the appointment of a committee of inquiry, and a meeting being held accordingly (at which the requisitionists were not present), the appointment of a committee was negatived. The requisitionists thereupon under Sects. 70 and 71 called an extraordinary meeting for the purposes stated in the original requisition. Kay, J., granted an injunction to prevent that meeting being held, but the Court of Appeal unanimously and unhesitatingly dissolved it. In giving judgment, Cotton, L.J., observed:

Status of extraordinary meeting.  
Taborlin's Case.

It is a very strong thing indeed to prevent shareholders from holding a meeting of the company when such a meeting is the only way in which they can interfere if the majority of them think that the course taken by the directors in a matter which is in *ultra vires* of the directors is not for the benefit of the company. The ground on which the directors limited their notice was, that everything proposed by the requisition beyond the appointment of a committee was illegal, and that, therefore, they were justified in not calling a meeting for the purpose of considering it. Now, I am of opinion that, if the object for which it is proposed to call a meeting is one which can be carried out in a legal way, then, although the notice may be so expressed that resolutions following its precise terms would be illegal, it is not right for the directors to limit the notice so as to prevent the meeting from entering into the question simply because the terms of the notice could justify a resolution which would be *ultra vires*.

The Court also intimated that the removal and election of directors would be within the powers of the meeting. All notices required by that or the special act to be given by advertisement must be advertised in the prescribed newspaper, or, if no newspaper be prescribed, or if the prescribed newspaper cease to be published, in a newspaper circulating in the district within which the company's principal place of business is situated (x): (Sect. 138.) To constitute

Mode of giving notices.

Quorum.

(s) This means "fourteen clear days." See *R. v. J. of Shropshire*, 8 A. & E. 173; *R. v. Aberdare Canal Co.*, 14 Q. B. 851; *Adey v. Hill*, 4 C. B. 38.

(t) See *Isle of Wight R. Co. v. Taborlin*, 25 Ch. D. 320; 53 L. J., Ch. 353; 50

L. T., 132; 32 W. R. 207 C. A.

(u) *Ibid.*

(x) For an instance of a meeting in pursuance of an advertisement being held invalid, see *Swansea Dock Co. v. Leven*, 20 L. J., Ex. 447.

### 3. Meetings of Shareholders.

#### Adjournment of meeting.

a meeting (whether ordinary or extraordinary) there must be present, personally or by proxy, the prescribed quorum; and if no quorum be prescribed in the special act, then shareholders holding, in the aggregate, not less than one-twentieth of the capital of the company, and being in number not less than one for every five hundred pounds of such required proportion of capital, unless such number would be more than twenty, in which case twenty shareholders, holding not less than one-twentieth of the capital of the company, form the quorum. And if, within one hour, the quorum be not present, no business, except declaring a dividend, can be transacted, and such meeting must (except it be to appoint directors) be held to be adjourned *sine die*: (Sect. 72.) The act provides for the appointment of the chairman at all meetings: (Sect. 73.) The shareholders at any meeting can proceed only with respect to the matters for which the meeting was convened, and such meeting may be adjourned: (Sect. 74.)

#### Scale of voting, and voting by proxies.

At all general meetings, every shareholder may vote according to the prescribed scale of voting; and if no scale shall be prescribed by the special act, every shareholder has one vote for every share up to ten, and an additional vote for every five shares beyond the first ten shares, and an additional vote for every ten shares held by him, beyond the first hundred shares, if he has paid up all calls on the shares held by him: (Sect. 75.) Votes may be given personally, or by proxies, being shareholders, and a form of proxy is given in the act (y). The chairman of the meeting has a casting vote, if there be an equality of votes: (8 Vict. c. 16, s. 76.) Instruments (z) appointing a proxy must be transmitted to the secretary before the prescribed period, and, if no period be prescribed, forty-eight hours before the meeting is held: (Sect. 77.) If shares are held jointly the person whose name stands first in the register of shareholders is entitled to vote: (Sect. 78.) The committees of lunatics and the guardians of minors may vote: (Sect. 79.) Whenever a particular majority of votes is required, such majority need only be proved in the event of a poll; in other cases a declaration of the chairman and an entry made in the book of proceedings is sufficient: (Sect. 80.)

#### Appointment of proxies.

#### Mode of transmitting proxy papers to shareholders.

It has long been a common practice for secretaries of companies to transmit stamped proxy papers to shareholders filled up with the names of proposed proxies, by signing which shareholders may concur

(y) See Schedule (F.) of the act.

(z) These instruments are liable to a stamp duty. See Stamp Act, 1870, 33 & 34 Vict. c. 97, as amended by 31 Vict. c. 1, s. 4, the effect of which enactments is that proxy-papers are subject to a duty of one penny, that they are confined to one meeting, and are void if unstamped. The

Inland Revenue Repeal Act, 33 & 34 Vict. c. 99, repealed the previous legislation on the subject, which, however, did not materially vary from the present law, except that the present law allows a plurality of proxies. See Griffith's Stamp Duties Digest, 7th ed. 1874, p. 82.

in a policy recommended by the Board of Directors. Such a practice is clearly liable to abuse. And it has been held that the funds of the company cannot be legally used in printing or sending out such proxy papers (a); and Standing Orders of both Houses of Parliament with reference to consents to extension bills forbids the sending out of stamped proxies, and the expenditure of the funds of companies thereupon (b).

We now proceed to show how the Board of Directors is constituted.

#### 4. *The Appointment of Directors, and their Meetings.*

#### 4. Directors.

The special act names the first Board of Directors, providing that they shall continue in office until the first ordinary meeting held after the passing of the act (c), and prescribes the number which shall be from time to time appointed by the shareholders: and sometimes the shareholders are authorized to increase or reduce the number of directors. The Companies Clauses Consolidation Act 1845 (d), contains the following provisions as to the appointment of directors:

The number must be the prescribed number: (8 Vict. c. 16, s. 81.) But they may be increased or reduced, at a general meeting of the company, if the special act authorizes such a proceeding: (Sect. 82.) The directors appointed by the special act continue in office until the first ordinary meeting in the year next after the special act is passed: at that meeting the shareholders elect the directors, the directors appointed by the special act being eligible to be re-appointed. At the first ordinary meeting, held every year afterwards, the places of retiring directors are in like manner supplied: (Sect. 83.) If, at any meeting for the election of directors, the prescribed quorum of shareholders be not present, the meeting stands adjourned to the following day; and if, at the adjourned meeting, such prescribed quorum be not present, the existing directors continue in office till the first ordinary meeting of the following year: (Sect. 84.) A director must be a shareholder, and hold the prescribed number (if any) of shares (e); and he may not hold or accept any office or place of trust or profit under the company, or be

The appointment of directors.

Mode of voting for directors.

Director must hold prescribed number of shares.

(a) *Shuldert v. Grosvenor*, L. R. 33 Ch. D. 528; 55 L. J. Ch. 689; 55 L. T. 171; 34 W. R. 754.

(b) C. S. O. 62, 61; L. S. O. 62, 64, post, vol. II.

(c) L. S. O. 130.

(d) 8 Vict. c. 16.

(e) A director, *nominated as such by the special act*, is liable in respect of his

shares up to the prescribed number, both on *scire facias*, *Porter v. Emmons* (C. A.), L. R., 1 C. P. D. 604; and as a contributory, *Kincaid's case*, L. R., 11 Eq. 103, although no shares may have been allotted to him. An *electrd* director would not seem to be thus liable. See *Jenner's case*, L. R., 7 Ch. D. 132, and cases, arising out of the Companies Act, there cited.



4. Directors.  
Disqualification  
of directors.

interested in any contract: (Sect. 85.) If he does, or if, in any manner, he participates in the profits of any work to be done for the company, or ceases to hold shares in the company, he ceases to be a director, and his place is declared vacant: (Sect. 86.) If a director contravenes this provision, the contract cannot be enforced against the company. This was decided—upon general principles—not upon the construction of the section—by the House of Lords in *Aberdeen R. Co. v. Blaikie* (f); and by the operation of the Judicature Act (g), the important doctrine, that a director is a trustee, and can therefore take no benefit from a contract with his *cestuis que trustent*, which was formerly recognized by Courts of Equity only, and not by Courts of Law (h), now has a general effect. The inability to enforce the contract will affect the assignees of the director (i).

It seems that the 86th section applies only to contracts made with the company in the execution of its enterprise, so that a director of a company may be also its banker (k), although on the principle of *Aberdeen R. Co. v. Blaikie*, he could make no profit out of his banking transactions with the company. But the disqualification as to contracts does not extend to contracts made with an incorporated joint-stock company, of which the director is a member, except that such director cannot vote on any question of contract with such joint-stock company: (8 Vict. c. 16, s. 87.)

Retirement of  
directors.

The directors retire from office at the times and in the proportions prescribed in the special act; and if no number be prescribed, one-third at the end of the first year, one other third the second year, and the remaining third the third year, the rotation being determined by ballot; but retiring directors are eligible to be re-elected: (Sect. 88.) If a director dies, resigns, becomes disqualified or incompetent (l), or ceases to be a director by any other cause than by going out by rotation, the remaining directors may elect a shareholder to supply his place: (Sect. 89) or the election may be by the shareholders either at an ordinary or extraordinary meeting (m). By the express terms of sect. 91 the removal of directors can be accomplished only at a general meeting.

Bankruptcy of  
directors.

Bankruptcy is a disqualification for a directorship by the combined effect of s. 50, par. 3, and s. 55 of the Bankruptcy Act,

(f) 1 Macq. 461; 23 L. T., () 8. 315.  
See also *Imperial Mercantile Credit Association v. Coleman*, L. R., 6 IL. 1. 169.

(g) 36 & 37 Vict. c. 66, s. 25, sub-s. 11.

(h) *Poster v. Oxford R. Co.*, 13 C. 11. 200; 23 L. J., C. P. 99.

(i) *Flanagan v. Great Western R. Co.*, L. R., 7 Eq. 116; 38 L. J., Ch. 117.

(k) *Sheffield and Manchester R. Co. v. Woodcock*, 7 M. & W. 574.

(l) Persons holding ecclesiastical offices are forbidden by 4 Vict. c. 14, to act as directors.

(m) *Needle of Wight R. Co. v. Tahourdin*, 50 L. T. 132.

1883 (12), and of the 85th section of the Companies Clauses Act, by which a director must be a shareholder. But it has been held that if a director holds shares in trust for his company in another railway company, although without the authority of an Act of Parliament, the shares will not pass to the assignees under the order and disposition clause, and the bankrupt director will be ordered by the Court to transfer the shares as his company may direct (13).

If the shareholders neglect to elect the full number of directors which the special act requires, it seems that a mandamus would lie to compel an election (14); but, with respect to the occasional vacancies occasioned by any other cause than by going out of office by rotation, it is in the option of the remaining directors whether they will fill up such vacancies or not. Where a railway act provided that the business of the company should be carried on under the management of twelve directors, and that when any director should die or resign, or become disqualified or incompetent to act, it should be lawful for the remaining directors to elect some other proprietor duly qualified in his place: the Court of Common Pleas decided that the act did not require that there should be always twelve directors, and that the power of re-election was not compulsory upon the remaining directors. If the directors were of opinion that their number was not sufficient to enable them to carry on the affairs of the company, they might elect others; but upon this point they were entitled to exercise an option (15).

Vacancies in the direction.

All acts done by a director, notwithstanding it was afterwards discovered that there was some defect in the appointment, or that he was disqualified, are declared to be as valid as if he had been duly appointed and qualified: (8 & 9 Vict. c. 16, s. 99.)

Validity of director's acts.

On the trial of actions to recover calls on shares, it is not necessary to prove the appointment of the directors who made the call: (Sect. 27.)

If a body of persons assume to act as directors without authority, the proper remedy seems to be to apply to the High Court for an injunction restraining them from acting.

Restraint of directors.

The directors hold meetings as they may appoint, and any two directors may call a meeting; and to constitute a meeting, a quorum

Meetings of directors.

(12) 46 & 47 Vict. c. 52. By sect. 50, sub-s. (3), "where any part of the property of the bankrupt consists of stock or shares," "the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt." By sect. 55, "the trustee may disclaim unmarketable shares or stock," and such disclaimer operates to determine all rights and liabilities of the bankrupt in respect of the

property disclaimed.

(13) *Great Eastern R. Co. v. Turner*, L. R., 8 Ch. App. 119; 42 L. J., Ch. 83, overruling *Lord Romilly, M. R.*

(14) *Thames Haven Dock Co. v. Rose*, 4 Man. & G. 559; 2 Dowd. N. S. 101; *Morley v. Hudson*, 1 Phil. 790; 16 L. J., Ch. 216; 4 Railw. C. 636.

(15) *Thames Haven Dock Co. v. Rose*, ubi supra.

4. Directors.

## Chairman.

## Appointment of committees.

## Remuneration of directors.

must be present, consisting, if not otherwise prescribed in the special act, of one-third of the directors; and it is necessary, in order to bind the company by a contract under seal, that the individuals who make up the quorum should act conjointly at a board (r). Such is clearly the intention of the act. Questions are decided by a majority of votes, and the chairman is entitled to a casting vote: (8 & 9 Vict. c. 16, s. 92.) A chairman and deputy-chairman of directors may be elected annually; and any vacancy happening during the year must be filled up: (Sect. 93.) In the absence of both, at a meeting of directors, a temporary chairman is to be chosen: (Sect. 94.) The directors may appoint one or more committees, and entrust them with power to do acts relating to the affairs of the company, which the directors could lawfully do, and which they shall think proper to entrust to them: (Sect. 95.) The committees must exercise their powers at a meeting, at which a quorum must be present, and their chairman has a casting vote: (Sect. 96.) But the directors cannot delegate all their powers to a committee (s), nor can a committee apportion amongst themselves the duties delegated to them (t).

The remuneration of directors is, by sect. 91, determined by the shareholders at a general meeting only, and a reasonable remuneration will be allowed, even though the company should be insolvent (u).

5. Power of Directors to contract.5. The Power of Directors to enter into Contracts.

## Application of funds.

C. C. Act, s. 63.

Statutory power of directors.  
Sect. 90.

We shall now point out the sections of the Companies Clauses Act which authorize the directors of a railway company to manage its important concerns. We shall find that, unless controlled by the shareholders, by a vote at a general meeting, their authority, provided it is exercised in cases within the powers of the company, is of the most extensive character. The Companies Clauses Consolidation Act, 1845, enacts, that the money to be raised by subscriptions, loans, or otherwise, must be applied, first, in paying the costs of the special act (r); secondly, "in carrying the purposes of the company into execution:" (Sect. 65.) The directors have the management and superintendence of the affairs of the company, and they

(r) *D'Aren v. Tunnell, &c. R. Co.*, L. R., 2 Ex. 158; 36 L. J., Ex. 37; 1 H. & C. 163. But see *Dunell's Electric Telegraph Co., In re*, L. R., 12 Eq. 246; 40 L. J., Ch. 567, in which Bacon, V.-C., distinguishing the above case, held an unsealed agreement by four directors to be valid, although signed separately by two of them.

(s) *Great Western R. Co. v. Rushout*, 5 De G. & S. 200.

(t) See *Cool v. Ward* (C. A.), L. R., 2 C. P. D. 265, decided on the Land Drainage Act, 1861.

(u) *Delfest R. Co. v. Delfest and Bangor R. Co.*, L. R., 3 Eq. 581.

(z) These may be recovered by action, *Hitchins v. Kilkenny and Great Southern and Western R. Co.*, 9 C. B. 536. The special act itself also usually provides for the recovery of costs. See ante, Chap. II., Sect. 2, p. 27.

may lawfully exercise all the powers of the company (y), except as to such matters as are directed by that or the special act to be transacted by a general meeting of the company, but all the powers so to be exercised must be exercised in accordance with and subject to the provisions of that and the special act; and the exercise of all such powers is subject also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting: (Sect. 90.)

The powers conferred by the 90th section are very wide, and the section will be liberally construed. The granting a gratuity of one week's extra wages to each deserving servant of a manufacturing company was held, by Jessel, M. R., to be clearly *intra vires* and reasonable (z). But compensation to past officials for loss of employment, and to directors for past services, cannot even be voted at a general meeting in a case where the company has transferred its undertaking to another company, and is being wound up (u).

Gratuity to servant.

The powers above referred to, which can be exercised only at a general meeting, are the choice and removal of the directors, except as hereinbefore mentioned, and the increasing\* or reducing of their number where authorized by the special act; the choice of auditors; the determination as to the remuneration of the directors, auditors, treasurers, and secretary (b); the determination as to the amount of money to be borrowed on mortgage; the determination as to the augmentation of capital, and the declaration of dividends: (Sect. 91.) In addition to the matters above enumerated, the special acts sometimes impose further limitations on the powers which the directors may exercise; and there is no doubt but that the directors stand in the position of trustees for the company, and cannot manage its affairs for their own advantage. Thus, if they are able to dispose of shares at a premium, they will have to account to the company for the profits (c). And they have been held personally liable to refund dividends improperly paid (d).

General meeting, when necessary.

Directors are trustees.

(y) The rule of ordinary partnerships that the act of one partner is the act of all, is not applicable either to promoters of a company; *Hamilton v. Smith*, 28 L. J., Ch. 404; or to the company when incorporated. See *Burnes v. Pennell*, 2 H. L. Cas. 497, per Lord Campbell.

(z) *Hampson v. Price's Patent Candle Co.*, 45 L. J., Ch. 437. On the same principle, granting of pensions would seem to be *intra vires*.

(a) *Hutton v. West Cork R. Co.*, L. R. 23 Ch. D. 654; 52 L. J., Ch. 689; reversing, in part, 52 L. J., Ch. 877.

(b) But it is no answer to an action by

a secretary for his salary, that no determination as to such salary has been exercised at a general meeting of the company. *Bell v. Dureuth Valley R. Co.*, 1 H. & N. 303; 26 L. J., Ex. 81.

(c) *York and North Midland R. Co. v. Hudson*, 16 Beav. 485; 22 L. J., Ch. 529. See also *Aberdeen R. Co. v. Blaikie*, 1 M'Q 461, p. 32, ante; *Parker v. McKinnon*, L. R. 10 Ch. 98; 43 L. J., Ch. 802; 31 L. T. 298, 739, affirming *Bacon v. V. Co.*; *North Eastern R. Co. v. Jackson*, 19 W. R. 193.

(d) *Salisbury v. Metropolitan R. Co.*, 18 W. R. 974. As to refunding money of

5. Power of directors to contract.  
Directors not personally liable for contracts.

No director, by lawfully executing any of the powers given to directors, is subject to be sued by any person whomsoever; and the directors, their heirs, &c., are indemnified out of the capital of the company, for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs and damages which they may incur in the execution of the powers granted to them. It has been expressly held by the House of Lords (though without reference to this section) that the directors of a railway company, by writing to the company's bankers requesting them to honour cheques, do not render themselves personally liable in respect of an overdrawn account (e).

Modes in which contracts may be made.  
Sect. 97.

The power which may be granted to any committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows:—

- (1) If the contract be such as is required by law to be in writing and under seal (f),—in writing, and under the common seal of the company (g).
- (2) If the contract be such as is required by law to be in writing, and signed by the parties to be charged (h),—in writing, signed by the committee or any two of them, or any two of the directors (i).
- (3) If the contract be such as would by law be valid, although made by parol only (k),—by parol (l):

And all such contracts are declared to be effectual in law, and to be binding upon the company and all other parties thereto. (Sect. 97.)

Result of cases under C. C. Act, s. 97.

The result of the principal cases upon this important section (m) may be briefly stated as follows:—

*Under the first two branches of the section:*

- (a) A contract does not bind the company unless it purport to bind them (n).

the company spent in fixing the market, see *Land Credit Company of Ireland v. Lord Byron*, L. R. 5 Ch. 763.

(c) *Dutton v. Lord Ebury*, L. R., 7 H. L. 102; 30 L. T. 581, affirming L. R., 7 Ch. 777, and reversing Bacon, V.-C., L. R., 7 Ch. 788, n.; 26 L. T. 350. As to personal liability on false representation of authority to accept bills, see *West London Commercial Bank v. Kibson*, 17 J. P. 821.

(f) As, for instance, a conveyance, see 8 & 9 Vict. c. 100.

(g) The seal must be affixed *at a board*. *Wiley v. Turner, &c. R. Co.* 36 L. J., Ex. 37; p. 31, ante.

(h) As, for instance, a contract to sell land, or an interest therein, or a contract not to be performed within a year, see the "Statute of Frauds."

(i) Where an agreement was not so signed, specific performance was refused in

equity. *Leominster Canal Navigation Co. v. Shrewsbury and Hereford R. Co.*, 26 L. J., Ch. 761.

(k) That is, any contract, except as otherwise provided by statute.

(l) See *Eales v. Cumberland Black Lead Mining Co.*, 30 L. J., Ex. 141. Where the agent of an incorporated railway company agreed by parol with the plaintiff to purchase of him a quantity of railway sleepers upon certain terms, and the sleepers were received and used by the company, it was held that there was evidence from which a jury might find a contract by the company. *Pauling v. L. & N. W. R. Co.*, 8 Exch. 867.

(m) See Lindley on Partnership, p. 360, and compare Companies Act, 1867, 30 & 31 Vict. c. 131, s. 37.

(n) *Seydell v. Derbyshire R. Co.*, 9 C. B. 811; 19 L. J., C. P. 371.

- (b) A contract does not bind the company, although the company may have had the benefit of it (o).
- (c) A contract, binding in itself, does not carry with it an authority to execute extra works on the order of a recognized agent (p).

*Under the third branch of the section :*

If the company has had the benefit of the contract, the authority of the directors will be presumed, in the absence of evidence to the contrary (q).

The rule of the common law is, that a corporation acts and speaks only by its common seal. In pursuance of this doctrine, all contracts made by corporations are required to be under their common seal, subject to certain exceptions, as where the acts done are such as the corporation by its very constitution is appointed to do, or where they are either trivial, or done under the pressure of an overwhelming necessity (r). The excepted cases depend upon very subtle distinctions; and the above enactment seemed likely to prevent many difficulties, which would otherwise have arisen, in enforcing contracts made by directors of companies. But notwithstanding the general terms of the 97th section, some very important questions have arisen as to the validity of contracts not made strictly according to its provisions. In *Homersham v. Wolverhampton Waterworks Co.* (s), the Court of Exchequer expressed an opinion that a company cannot contract except in pursuance of the provisions of the 97th section; and it was accordingly determined that an engineer, who had entered into a contract to perform certain works for the company under seal, could not recover a sum of money which he charged for extra works, although all these extra works were done with the approval of the engineer to the company. The Court seemed to be of opinion, that the mere fact of the work being done and accepted was not sufficient to charge the company, in the absence of proof of any order from the directors. But in *Lowe v. L. & N. W. R.*

(o) *Leominster Canal Co. v. Shrewsbury, &c. R. Co.*, 26 L. J., Ch. 784. *Yatch v. Corporation of Leamington*, 8 Q. B. D. 579, C. A., decides that s. 174 of the Public Health Act, 1875, has a similar effect.

(p) *Homersham v. Wolverhampton Waterworks Co.*, 6 Ex. 137; 20 L. J., Ex. 193.

(q) *Lowe v. L. & N. W. R. Co.*, 18 Q. B. 632.

(r) See *Church v. Imperial Gas Co.*, 6 A. & E. 846; *Diagle v. London and Blackwall R. Co.*, 6 Ex. 442, and the whole series of cases up to 1867, carefully examined in Leake on Contracts, p. 252.

See also *Austin v. Guardians of Bethnal Green*, L. R., 9 C. P. 91. In *Crompton v. Farns R. Co.*, L. R., 7 Ch. 562, the important question was raised whether a party contracting, but not in due form, and so *prima facie* losing the benefit of his contract, would, in event of performance, have a remedy against the individual with whom the contract was made, or he without a remedy altogether. Lord Hatherley seemed to be of opinion that if the contract were essential to the existence of the corporation, the corporation would be bound, otherwise not.

(s) 6 Exch. 137; 20 L. J., Ex. 193.

5. Power of Directors to contract.

*Co. (t)*, a railway company were held liable to be sued for the actual use and occupation of the plaintiff's land, although no contract made under seal, or by the authority of a director, was proved. The Court decided this case, not only on the grounds that when land was actually occupied, the law would imply a promise to pay a reasonable compensation for its use, but they also intimated that if it were necessary to refer to the provisions of the 97th section of the act, they would presume that there was a parol contract made by a director to pay for the use of the land (*u*).

Books of proceedings.

Minutes of all appointments, contracts, orders, and proceedings of the directors and committees must be entered in books (*x*), and every such entry signed by the chairman presiding at the meeting (*y*), and the minutes are then receivable in evidence, without further proof: (8 & 9 Vict. c. 16, s. 93.) And all acts done by directors are valid, although a director may have been disqualified or defectively appointed: (Sect. 99.)

Bills of exchange.

As it would be quite foreign to the purposes of a railway company to draw or accept bills of exchange, the directors have no power to do so (*z*); consequently, if they draw or accept a bill of exchange,

(t) 21 L. J., Q. B. 361; 18 Q. B. 632.

(u) See also *Fintlay v. Bristol and Exeter R. Co.*, 7 Exch. 409; *Doe d. Birmingham Canal Co. v. Rolt*, 11 Q. B. 127; *Pauling v. London & North Western R. Co.*, 8 Exch. 867. In *Smith v. Hull Glass Co.*, 21 L. J., C. P. 106; 18 Jur. 593; 11 C. B. 897, a joint-stock company were held liable to pay for goods which had been delivered and used for the purposes of the company, although the goods had been ordered by persons who had no authority under the statute to give such orders. See also the remarks made by Sir J. Wigram, V.-C., in *Nixon v. Taff Vale R. Co.*, 7 Hare, 148; *Waring v. Manchester R. Co.*, *Ibid.* 492; and *Athenaeum Life Assurance Co. v. Pooley*, 28 L. J., Ch. 119; and *Urmpton v. The Furness R. Co.*, L. R., 7 Ch. 562; 41 L. J., Ch. 817, where, by the constitution of the company, all contracts above the value of 500*l.* were required to be under seal, and the contract in question being above that value and not under seal, the plaintiff was held not to be entitled to a decree for specific performance or to damages. It was held before this act that an attorney need not have an authority under seal to defend or refer a cause. *Beckett v. Eastern Counties R. Co.*, 2 Exch. 311; *S. C.*, 6 Dowl. & L. 51.

(v) The words used in this section confer a privilege, but do not exclude other evidence of the facts; per Lord St. Leonards, C., in House of Lords, *Inglis v. Great Northern R. Co.*, 10 Jur. 825. See also

*R. v. Justices of Leicester*, 7 B. & C. 6; *Smith v. Huggett*, 31 L. J., C. P. 39.

(y) Where a statute required that the directors should keep a minute and entry of the orders and proceedings of every meeting of the directors, "which shall be signed by the chairman at each respective meeting," and the evidence showed that the minutes had been signed by the chairman, not at the meeting when the proceedings took place, but at the next meeting, over which he also presided as chairman, — it was held that the minutes were sufficiently signed, *Southampton Dock Co. v. Richards*, 1 M. & G. 448; *S. C.*, 2 Railw. Cas. 215; 1 Scott, N. R. 219. This doctrine has been since affirmed in the House of Lords, and applied to the 98th section; see the judgment by Lord St. Leonards, C., in *Inglis v. Great Northern R. Co.*, 18 Jur. 895; 1 M. C. 112. See also on the same point *London and Brighton R. Co. v. Fairclough*, 2 Man. & G. 674; 2 Railw. Cas. 514; 3 Scott, N. R. 68; *West London R. Co. v. Bernard*, 3 Q. B. 873; *Miles v. Bough*, 8 Q. B. 845; 3 Gale & D. 119; *Sheffield and Manchester R. Co. v. Woodcock*, 3 Railw. Cas. 522; 7 Mee. & W. 574. But where, at a subsequent meeting, a minute not having been previously signed, a call was confirmed, held not sufficient, *Cornwall Lead and Copper Mining Co. v. Bennett*, 29 L. J., Ex. 157. As to how far and against whom minutes are evidence, see *Ex parte Stock*, 33 L. J., Ch. 781.

(z) *Butevill v. Mid Wales R. Co.*, 35

and even describe themselves as directors, they cannot bind the company by such an act, although they may make themselves personally liable to pay the bill (*a*) in an action for falsely representing that they had authority to accept bills (*b*).

Nor will the company be bound by a cheque drawn by directors on the company's bankers, unless it be properly signed. Thus, where three directors of a railway company, in the name of the company, signed a document intended to operate as a cheque on the company's bankers for payment to a third party of the company's money, and the document was signed by them in their own names, and counter-signed by the secretary of the company, with the word "secretary" added to his signature, and a stamp bearing the name of the company was affixed, but the three directors did not appear on the face of the cheque to sign as directors, or to be directors: it was ruled that the document did not purport to be the cheque of the company, and was not binding on them (*c*).

Cheques improperly drawn.

As the powers to borrow are always limited by the special act, the directors have no authority to borrow beyond the specified amount, and if they do, the company will not be bound (*d*).

Money borrowed.

Cases have arisen where individuals have sought to get rid of contracts with railway companies on the ground of their being *ultra vires*. As yet none have succeeded. A contract that the defendant should run a steamer for the accommodation of the through traffic of a railway company has been upheld on demurrer (*e*), and a reasonable charge for a weighing-machine, though not expressly authorised, has been allowed to be made (*f*).

Steamboat.

Weighing machine.

### G. Decisions relating to particular Contracts *ultra vires*.

G. Particular contracts.

We will now notice some decisions which relate to the construction of contracts with railway companies where no questions have arisen as to the authority of the directors to enter into the particular contract.

Construction of contracts.

Where an obligation entered into by deed has by a subsequent act of Parliament been rendered impossible to be performed, a Court of

Contracts released by act of Parliament.

L. J., C. P. 205; 1 Harr. & Ruth. 508; L. R., 1 C. P. 499.

(a) See *Houley v. Story*, 3 Exch. 3; *Owen v. Van Uster*, 10 C. B. 318; *Dutton v. Marsh*, L. R., 6 Q. B. 361.

(b) See *West London Commercial Bank v. Kitson*, 47 J. P. 821.

(c) *Serrell v. Derbyshire, Staffordshire and Worcester Junction R. Co.*, 19 L. J., C. P. 371; 9 C. B. 871.

(d) *Burmeser v. Norris*, 6 Exch. 796; 21 L. J., Ex. 43; *Terrakham v. Cameron's Co.*, 13 Jur. 325; 9 De G. & S. 296; *Rotherham Mining Co.*, 11 Jur. 871; 1 De G., M. & G. 19; and as to "Lloyd's Bonds," see Chap. III., Sect. 8.

(e) *South Wales R. Co. v. Richmond*, 10 C. B., N. S. 675.

(f) *L. & N. W. R. Co. v. Price*, L. R. 11 Q. B. D. 485; 52 L. J., Q. B. 761.



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Law will, it seems, take it for granted that due provision has been made for compensating the party who would otherwise have been entitled to recover damages, and the existence of the act may be pleaded in answer to an action on the contract (g). It seems, therefore, that when railway companies have become amalgamated, the legal rights of the company depend upon the powers which have been conferred upon them by Parliament, unfettered by previous agreements which are inconsistent with the plain intention of the legislature. In one case the House of Lords held the amalgamated company to be bound by a covenant entered into, by one of the companies, with a landowner, previous to amalgamation (h).

Agreement to  
stop at station  
for lessee of re-  
freshment rooms.

Where a company granted a lease for ninety-nine years of some refreshment rooms, and it was declared to be the intention of the company, and the understanding of the plaintiff, that, in consideration of the outlay incurred in erecting the refreshment rooms, the company should give every facility to the plaintiffs, to enable them to obtain an adequate return, by means of the rents and profits to be derived from the refreshment rooms, and that all trains carrying passengers, (not being goods trains or trains to be sent express or for special purposes, and except trains not under the control of the company,) which should pass the station either up or down, should, save in case of emergency or unusual delay arising from accidents, stop there for the refreshment of passengers for a reasonable period of about ten minutes; and that, as far as the company could influence the same, the trains not under their control should be induced to stop for the like purpose; and the company thereby engaged not to do any act which should have an effect contrary to the above intention; it was decided, first, that this was an absolute covenant that the trains should stop ten minutes to enable the passengers to obtain refreshments, and secondly, that express trains are not "trains sent by express or for special purposes," within the exception of the covenant (i).

And in a case arising many years afterwards out of the same agreement, it was held that a mail train ordered by the Postmaster-General to stop five minutes only at the station, was not a train "under the

(g) *Wynn v. Shropshire Union R. Co.*, 5 Exch. 441; and see *Stevens v. South Devon R. Co.*, 21 L. J., Ch. 516.

(h) *Edinburgh and Glasgow R. Co. v. Campbell*, 9 L. T. 157. As to companies amalgamated after 1863, by special act incorporating the Railways Clauses Act, 1863, see that act, 26 & 27 Vict. c. 92, s. 40 et seq., Vol. II., "Statutes," &c.

(i) *Rigby v. Great Western R. Co.*, 14 M. & W. 811; *Same v. Same*, 15 L. J.,

Ch. 286. It was further held on a case sent from Chancery that Rigby, having demised the refreshment rooms with a covenant to do all such things as should be necessary for enforcing performance of the covenant on the part of the company to stop the trains, was bound to file a bill for an injunction to restrain the company from allowing express trains to pass without stopping. *Same v. Same*, 4 Exch. 220.

control of the company," within the meaning of the agreement, and that the company might carry passengers by such mail train (*k*).

It has been frequently agreed between the promoters of a railway company and a landowner that the company will provide a station or other accommodation for the landowner in consideration of his withdrawing opposition to their bill. Such an agreement, if adopted by the company, will be strictly enforced against them. Usually the judgment will be for specific performance; and that although the plaintiff may have entered into a negotiation for money compensation which has failed (*l*), or although the performance will cause considerable inconvenience to the public (*m*), and although the plaintiff, and not the company, is in possession of the land on which the work was agreed to be constructed (*n*).

Agreement to build station, &c. for landowner.

Where a company agreed with the landowner through whose land the line ran to build a station, at which "all passenger trains should regularly stop," it was held by the House of Lords that the term passenger trains included Queen's Messenger trains, run only when the Queen was residing at Balmoral, and Post Office trains advertised in the time-tables, and carrying through passengers, but not excursion trains at low fares not so advertised (*o*).

Agreement to stop at station for landowner.

An agreement that there shall be no "goods or cattle station" at Bala Station was held broken by the erection of buildings 140 yards off, and an injunction was granted to pull the buildings down though nearly completed (*p*).

Agreement not to have goods or cattle station.

It is, of course, difficult to enforce specifically agreements made at a very early date. But even in such a case the Court will, it seems, assist the landowner as far as possible.

The case of *Hood v. North Eastern R. Co.* (*q*) well illustrates this. There a company covenanted, in 1838, that a piece of land should be

"First class station."

(*k*) *Phillips v. G. W. R. Co.*, L. R., 7 Ch. 409, per Lord Hatherley, C., overruling *Wickens*, V.-C. The plaintiff in this case was assignee of Rigby. The lease of the refreshment rooms at the station (Swindon) was made in 1841, so that the statute (1 & 2 Vict. c. 98), under which the Postmaster-General acted, was anterior in date thereto.

(*l*) *Greene v. West Cheshire Lines Committee*, L. R., 13 Eq. 44; 41 L. J., Ch. 17 (agreement to construct siding).

(*m*) *Rajahul v. Thames Valley R. Co.*, L. R., 2 Ch. 147, reversing *Jessel*, M. R., L. R., 2 Eq. 37 (agreement to make road). See also *Lloyd v. Chatham and Dover R. Co.*, 2 De G., J. & S. 568 (agreement not to erect building); *Wilson v. Furness R. Co.*, L. R., 9 Eq. 28; 39 L. J., Ch. 19 (agreement to make road and wharf); *Storer v. G. W. R. Co.*, 2 Y. & C. C. 48

(agreement to make bridge). In *Turner v. London and South Western R. Co.*, L. R., 17 Eq., at p. 573, it was held by Hall, V.-C., that a special act giving a landowner the right to stop "ordinary" trains, did not include a right to stop accelerated trains forming part of a fast through service.

(*n*) *Greene v. West Cheshire Lines Committee*, *ubi supra*.

(*o*) *Burnett v. Great North of Scotland R. Co.*, L. R., 10 App. Cas. 117; 51 L. J., Q. B. 531; 53 L. T. 507.

(*p*) *Pries v. Balm and Festiniog R. Co.*, 50 L. T. 787, per Chitty, J.

(*q*) L. R., 5 Ch. 626; 23 L. T. 206, partly affirming and partly reversing *James*, V.-C., L. R., 8 Eq. 686. The original route was only from York to Darlington. See also *Flood v. Same Co.*, 21 L. T. 258.

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Contracts.

for ever used as a first-class station. The station was built, and the railway completed in 1842. In 1869 the landowner filed a bill against the successors (by amalgamation) of the agreeing company to compel them to build a larger station, and to stop all their trains thereat; his complaint being that the station was used as a third-class one, and that only nine out of the twenty-three trains a day stopped there. The result was an order restraining the defendants from stopping a less number of trains in the twenty-four hours than might from time to time stop at the most favoured stations on the original route, excepting, however, express, special and mail trains.

But where the agreement between the parties is of a vague and indefinite character, as in the case of an agreement simply to build "a station" in a good and workmanlike manner, &c., specific performance will be refused, and the plaintiff's remedy will be in damages only, to be assessed, however, according to the rules of law against persons who are wrongdoers in the sense of refusing to perform their contracts (*r*).

Duration of an  
agreement to  
grant running  
powers.

The plaintiffs, a railway company, agreed with the defendants as follows:—That a station on the defendants' line should be used equally by both companies, subject to the bye-laws of the defendants, and that a committee from each Board should be appointed to arrange the working of the traffic; that the cost of the station and the working should be borne equally; that the defendants should have the right of running with their engines on the plaintiffs' line, and that the plaintiffs should have the same right over the defendants' line, paying in either case a certain per-centage of the gross receipts to the company whose line was used; and that each company should provide station accommodation for the other for three years, according to certain specified conditions.

On this agreement there were two alternative constructions contended for: one, that the last article of the agreement was merely a licence to use the line interchangeably by the two companies, determinable at the will of the defendants; the other, that it was a con-

(*r*) *Wilson v. Northampton and Banbury Junction R. Co.*, L. R., 9 Ch. 279, affirming *Bacon v. C.*, ib. p. 281, n.; 29 L. T. 879. In *Hutchill v. Salisbury and Dorset R. Co.*, 23 W. R. 531; 32 L. T. 217, specific performance of an agreement to build a station was decreed against a company which had succeeded by statute to the liabilities of the first agreeing company, but this decree was substantially varied on appeal, ib.; 23 W. R. 891. In *Pirih v. Midland R. Co.*, L. R., 20 Eq. 10; 41 L. J., Ch. 313; 32 L. T. 219, a substituted agreement to erect two bridges having been rendered impossible of per-

formance by the death of one of two named arbitrators, the plaintiff obtained specific performance of two earlier agreements to the same effect. In *Borling v. Pontypool, &c. R. Co.*, L. R., 18 Eq. 714; 43 L. J., Ch. 761, the company was bound by its act to make a good and sufficient siding on a specified field. It was held that the obligation was not broken, though the company took for other purposes so much of the specified field as not to leave any access from the siding to an adjoining road without passing over the land taken, or out of the specified field.

tract binding on both parties for ever, not to be varied against either party without the consent of that party. Sir J. Parker, V.-C., on a motion for an injunction, was of opinion that the latter was the true construction (s).

In *Harrison v. Great Northern R. Co.* (f), the plaintiff covenanted to supply the company with 350,000 sleepers, of a quality mentioned in a specification, and to deliver them as the engineer of the company should require; and the company covenanted to pay the price upon the engineer certifying the due delivery of each cargo. It was held that this amounted to a complete contract to take the whole of the sleepers, and that the plaintiff was entitled to notice of the times when the sleepers would be required.

Contract to supply sleepers.

Where, by a contract entered into with a railway company, it is stipulated that goods, e.g., coke (u), shall be supplied to, or works executed for the company, to the satisfaction of some third person or of their own officer or engineer for the time being, and that no money shall be paid by the company until his certificate is obtained, the obtaining of that certificate is a condition precedent to the right to the money. Until such third person, officer or engineer has spoken (x), the contractor has no rights which he can enforce, either at law or in equity (y). Parties, therefore, ought to be careful how they enter into contracts giving such powers. If, however, the works are to be executed to the satisfaction of the other party, then this satisfaction must be reasonable (z). And if the certificate of such third person is withheld unjustly, fraudulently or collusively, for the purpose of preventing the contractor getting his money, he may either sue the person withholding the certificate (a); or, perhaps, bring his action against the person who ought to pay the money, charging that the certificate is withheld in collusion with the defendant and by his procurement (b).

Rights of contractor when engineer's certificate withheld.

(s) *Great Northern R. Co. v. Manchester R. Co.*, 5 De G. & S. 138; 16 Jur. 146; approved by James, L.J., in *Llanelli Dock and R. Co. v. L. & N.W. R. Co.*, L. R., 8 Ch. 919; affirmed by House of Lords, L. R., 7 H. L. 550. See also *Whitehouse v. Liverpool Gas Co.*, 5 C. B. 798.

(f) 21 L. J., C. P. 89; 11 C. B. 815; S. C. in Error, 16 Jur. 565; 22 L. J., C. P. 49; 12 C. B. 576.

(u) *Grafton v. Eastern Counties R. Co.*, 8 Exch. 699.

(z) The certificate need not be in writing unless that is expressly stipulated for. *Roberts v. Watkins*, 32 L. J., C. P. 291; 14 C. B., N. S. 592.

(y) *Morgan v. Birnie*, 9 Bing. 672; *Scott v. Corporation of Liverpool*, 27 L. J., Ch. 611; 28 L. J., Ch. 230; *Munro v. Duth*, 8 E. & B. 738; *McIntosh v. Great Western R. Co.*, 2 De G. & Sm. 753; 18

L. J., Ch. 91; on appeal, 2 Macn. & G. 74; 19 L. J., Ch. 374; 3 Sm. & G. 146; 24 L. J., Ch. 469; *Waring v. Manchester R. Co.*, 18 L. J., Ch. 450; 2 Hafl & Twells, 259; *Padley v. Lincoln Waterworks Co.*, 19 L. J., Ch. 436.

(z) *Parsons v. Serton*, 4 C. B. 399; *Stadhard v. Lee*, 32 L. J., Q. B. 77; 3 Best & N. 361. See this case as to the employer's right to proceed himself with the work, if not proceeded with to his satisfaction, and deduct the cost from the contract price.

(a) *Milner v. Field*, 5 Exch. 829; *Scott v. Corporation of Liverpool*, on demurrer to bill against engineer, which was overruled, 25 L. J., Ch. 227. See also *Walker v. L. & N.W. R. Co.*, 45 L. J., C. P. 787.

(b) *Batterbury v. Fynn*, 32 L. J., Ex. 177; 8 L. T. 283; 2 H. & C. 42. But see *Clarke v. Watson*, 34 L. J., C. P. 148.

3. Particular  
Contract.  
Other rights of  
contractor.

Where a bill was filed against a corporation and their engineer for payment of the contract price of certain works, and the case against the engineer broke down, the bill was dismissed with costs, as against the corporation also (c). Where a contractor was to be paid in debentures and shares, which the company, having repudiated the contract, were proceeding to sell, Wood, V.-C., refused an injunction to restrain the sale, on the ground that the Court is unable to superintend the execution of works of such character (d). The construction of two successive contracts between a railway company and their contractor, by the first of which the company had a lien on and power of sale of the contractor's plant in the case of his default, and by the second of which, upon the contractor's becoming embarrassed, they agreed to make the line themselves by the use of the plant, came before the House of Lords in *Hunt v. South Eastern R. Co.* (e). The House held that the lien and power of sale were lost by the terms of the second contract.

Minerals, cove-  
nant to ship at  
particular dock.

Where a company took land for their railway upon a long lease from the trustees of the Bute Docks, and covenanted that when minerals conveyed on their railway should be shipped into any vessel in any dock or basin whatever other than the "West Bute Dock," they would pay to the owners of the West Bute Dock the same wharfage dues which would have been payable if the minerals had been shipped at such dock, it was held by the House of Lords that the covenant must be confined to any dock in connection with the railway, and also, that the covenant was neither *ultra vires* nor in restraint of trade (f).

Royalties.

With regard to royalties it has been held, also by the House of Lords, that a railway company bringing minerals upon lands for a temporary purpose only are bound to pay royalties under a covenant affecting those lands. This was in a case where the landowner leased the land to an iron company, who covenanted to pay him a royalty in respect of the "produce of any lands or mines not included in the lease, but which should be raised within twenty miles from any part of them, and should be brought through, over or under them." The iron company sublet part of the lands to the railway company, who constructed sidings upon it, and brought upon the siding trains containing minerals raised within the twenty miles (g).

(c) *Scott v. Corporation of Liverpool*, *ubi supra*.

(d) *Peto v. Brighton, &c. R. Co.*, 32 L. J., Ch. 877.

(e) *Hunt (Executor of Jay) v. S. E. R. Co.*, 45 L. J., C. P. 87, reversing the judgment of the Exchequer Chamber, and affirming that of the Common Pleas. See also *Munro v. Wrentham and Lightnings* &

*R. Co.*, 1 D. G., J. & S. 723, in which the court refused to grant the contractor an interlocutory injunction.

(f) *Taff Vale R. Co. v. Maenab*, L. R., 6 H. L. 169; 42 L. J., Q. B. 153, reversing the judgment of the Exchequer Chamber, and restoring that of the Queen's Bench.

(g) *Great Western R. Co. v. Ross*, L. R., 4 H. L. 650; 39 L. J., Ch. 553.

A director may, by leave of a judge, be called upon to answer interrogatories in an action to which his company is party (*h*), but is not, it would seem, a "judgment debtor," so as to be orally examinable as to what debts are owing to the company, on behalf of a person entitled to enforce a judgment for the recovery of money (*i*).

Examination of director.

### 7. *The Control of the Shareholders over the Directors.*

7. Control of Shareholders over Directors.

We have seen (*ante*, sect. 5) that the general superintendence and management of its affairs belong to them, and that the shareholders may always call a general meeting of the company, and at such meeting the majority may control and regulate the future proceedings of the directors (*k*).

The result seems to be, that the supreme control of the affairs of a railway company is vested in the shareholders, who have power at general meetings, due notice having been given, of the purpose of such meetings, to originate proceedings for any purpose within the scope of the company's powers, and also to control the directors in any acts which they may have originated (*l*). On the other hand, the acts of the directors are valid, provided they are such as fall within the scope of their authority, until the shareholders interfere, by entering into resolutions, at a general meeting, duly called pursuant to the provisions of the statute (*m*).

If, therefore, the shareholders of a company are dissatisfied with the proceedings of the directors, the proper course is to convene a general meeting of shareholders, and thus submit the proceedings of the directors to the decision of the governing body; and if the directors do any act inconsistent with the decision of the general meeting, an injunction may be obtained against them (*n*). Courts of Equity will not, however, enforce every duty, which the governing body of a railway company owe to their constituents, the shareholders. Whenever the acts of the directors are capable of being rectified by the shareholders themselves in the exercise of their own powers equity will not interfere so long as the directors do not exceed their

Questions of internal regulation to be settled by shareholders at a meeting.

(*h*) Rules of Supreme Court, 1883, Order XXXI. r. 5. As to interrogatories to secretary, see *Brichartise v. G. W. R. Co.*, L. R., 6 C. P. 36.

(*i*) *Dickson v. North and Eireon R. Co.*, L. R., 1 Ex. 87; 33 L. J., Ex. 57 (dis. Channell, B.), decided on C. L. P. Act, 1854, s. 60, from which Order XLV. r. 1, does not substantially differ.

(*k*) As to the sanction of shareholders to working agreements, see 20 & 27 Vict. c. 92, s. 23, post, Vol. 2.

(*l*) *Foss v. Harbottle*, 2 Ware, 492.

(*m*) 6 & 9 Vict. c. 10, s. 80, vol. 2.

(*n*) *Erster R. Co. v. Butler*, 16 L. J., Ch. 449. The Courts of Equity will take no notice that a purchase of shares was made for the purpose of enabling the purchasers to attend at a general meeting, and reverse a former decision which a majority of the shareholders had come to, and which was adverse to the interests of the purchasers of the shares. *Ibid*.

*Y. Control of  
Shareholders over  
Directors.*

*Example, Foss  
v. Harbottle.*

powers; questions of internal regulation and management must, therefore, be decided by the shareholders themselves (o).

Thus, in *Foss v. Harbottle* (p), where certain shareholders of "The Victoria Park Company," who were dissatisfied with the conduct of the directors, neglected to summon a general meeting of the shareholders, but filed a bill in equity against the directors, Sir J. Wigram, V.-C., observed:—

"It is only necessary to refer to the clauses of the act, to show that, whilst the supreme governing body, the proprietors, at a special general meeting assembled, retain the power of exercising the functions conferred upon them by the act of incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the plaintiff. This, in effect, purports to be a suit by cestui que trusts, complaining of a fraud committed, or alleged to have been committed, by persons in a fiduciary character. The complaint is, that those trustees have sold lands to themselves, ostensibly for the benefit of the cestui que trusts. The proposition I have advanced is, that, although the act should prove to be voidable, the cestui que trusts may elect to confirm it. Now who are the cestui que trusts in this case? The corporation, in a sense, is undoubtedly the cestui que trust; but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation, upon the terms of being liable to be so bound. How, then, can this Court act in a suit constituted as this is, if it is to be assumed, for the purposes of the argument, that the powers of the body of the proprietors are still in existence, and may lawfully be exercised for a purpose like that I have suggested? Whilst the Court may be declaring the acts complained of, to be void at the suit of the present plaintiffs, who, in fact, may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree, by lawfully resolving upon the confirmation of the very acts which are the subjects of the suit. The very fact, that the governing body of the proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive that the frame of this suit cannot be sustained whilst that body retains its functions. In order, then, that this suit may be sustained, it must be shown, either that there is no such power as I have supposed remaining in the proprietors, or at least, that all means have been resorted to, and found ineffectual, to set that body in motion."

*Subsequent ap-  
proval of Foss v.  
Harbottle.*

Lord Cottenham, C., in subsequent cases said, that he fully concurred in the observations made by Sir J. Wigram in *Foss v. Harbottle*, and that the judgment in that case correctly represented the principles and practice of the Court, in reference to suits of that description (q); and in *McDougall v. Gardiner* (r) the Court of

(o) *Brown v. Monmouthshire R. Co.*, 13 Beav. 32; 20 L. J., Ch. 497; *Stevens v. South Devon R. Co.*, 9 Haic. 313; 21 L. J., Ch. 816; *Kent v. Jackson*, 14 Beav. 387; 21 L. J., Ch. 438; *Frazer v. Whalley*, *Garlside v. Same*, 11 L. T. 175; 2 Hen. & M. 10; *McDougall v. Jersey Imperial Hotel Co., Limited*, 34 L. J., Ch. 28.

(p) 2 Haic. 461, A.D. 1812.

(q) *Mosley v. Alston*, 1 Phillips, 790; 10 L. J., Ch. 217; see also *Bailey v. Birkenhead R. Co.*, 12 Beav. 433; 19 L. J., Ch. 377; *Hattersley v. Earl of Shelburne*, 31 L. J., Ch. 873; *Lindley on Partnership*, 3rd ed. p. 938.

(r) L. R., 1 Ch. Div. 13; 45 L. J., Ch. 27; 33 L. T. 521, per James and Mellish, L.J.J., and Baggaflay, J.A.

Appeal once more affirmed the general principle "that nothing connected with internal disputes between shareholders is to be made the subject of an action by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive or fraudulent, or something *ultra vires* on the part of the company, or on the part of the majority of the company, so that they are not fit persons to determine it."

It has been said too, that if it is absolutely necessary that the Court should interfere at once, because irreparable injury would be done, before the time for taking the necessary steps to call a general meeting of the shareholders elapsed, then the rule above mentioned will not be allowed to prevail (s).

Cases, where the rule does not prevail.

There is a clear distinction to be observed between unauthorized acts on the part of directors, voidable only, and which it is competent for the governing body to confirm at a general meeting, and acts which are altogether void, and which may not be so confirmed (t). Thus, if directors are guilty of fraud or misconduct, in committing unauthorized acts in the name of the company, proceedings may be taken against them by the shareholders who are aggrieved, and the Court will hold the parties liable for all losses and expenses sustained by their misconduct (u). Where directors improperly withhold the seal of the company, so that it cannot be used, an action may be brought in the name of the company to restrain them from any acts inconsistent with the wishes of the majority of the shareholders (v). And where the liability arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them. It is, therefore, not necessary to make all who may, more or less, have joined in the act complained of, parties to the action. And although in general all such actions ought to be brought in the name of the corporation (y), yet, if a case arises of injury to some of the members of the corporation, for which no adequate remedy remains, except that of an action by individual corporators in their private character, and asking in such character the protection of those rights to which, in their corporate character, they are entitled, the Court will dispense with the presence of parties,

Distinction between void and illegal acts of directors.

(s) *Great Western R. Co. v. Rushout*, 16 Jurist, 238; 5 Do G. & Sm. 290, 310; 7 Railw. C. 990.

(t) *Ware v. Grand Junction Waterworks Co.*, 2 Russ. & M. 470; *Ward v. Society of Attornies*, 1 Collier, 370.

(u) *Attorney-General v. Wilson*, 1 Craig & Ph. 1; *Society for Practical Knowledge v. Abbott*, 2 Beav. 559; *Jones v. Ross*, 4 Hare, 52; *Salisbury v. Metropolitan R. Co.*, 18 W. R. 974.

(v) *Exeter and Crediton R. Co. v. Buller*,

16 L. J., Ch. 449.

(y) *Foss v. Harbottle*, 2 Hare, 461; *Mozley v. Alston*, 1 Phil. 790. If a director improperly retains premiums arising from the sale of shares, he is liable in equity to be sued for the amount of the premiums, with interest thereon at the rate of five per cent. *York and North Midland R. Co. v. Hudson*, 16 Beav. 485; 22 L. J., Ch. 529. See *Lane's Case*, 33 L. J., Ch. 84.



7. *Control of Shareholders over Directors.*

If the acts are illegal, one or more of the shareholders may obtain relief.

who would, according to the general practice, have been necessary parties to the action (2).

Lord Cranworth, V.-C., observes on this point, in *Beman v. Rufford* (a) :

“The principle on which these shareholders filed this bill is this, that they are entitled to file it on behalf of themselves and all others, because the Court will not tolerate any person saying that all are not interested in having the law of their company carried into effect. It will not allow any speculation that it would be more advantageous to do something which the act of Parliament does not authorize to be done ; therefore it is, that in this, as in many other cases, one shareholder may file a bill on behalf of himself and others, although at a meeting of the company a great many of the other shareholders, even the majority, may say that they have sanctioned a different course of proceeding.”

Colorable action.

But although one shareholder may undoubtedly, in general, bring an action on behalf of himself and the other shareholders (b), for the purpose of restraining the directors from pursuing a line of conduct which is illegal ; yet where a plaintiff merely holds his shares as a nominee of other persons, who indemnify him against costs, his action will be dismissed (c). But a plaintiff has not any the less locus standi from the fact that he brings his action in the interest of a rival company, and has become a shareholder for the mere purpose of bringing it (d).

The distinction between the authorities upon these points is well put by Lord Chelmsford in *Bloxum v. Metropolitan R. Co.* (e) :—

*Bloxum v. Metropolitan R. Co.*

Action by shareholder who has become such for the purpose of litigation.

“No one can possibly approve the manner in which the plaintiff introduced himself to the company. By some concert with extension shareholders, the particulars of which have not been revealed, the plaintiff comes forward in the assumed character of a holder of this description of stock and invites combination and co-operation largely from the body of these shareholders. He then becomes

(2) *Preston v. Great Collier Dock Co.*, 2 Railw. Cas. 335 ; 8 C., 11 Sim. 327 ; *Salomons v. Laing*, 12 Beav. 377 ; 19 L. J., Ch. 260 ; *Clements v. Bowers*, 21 L. J., Ch. 306 ; *Carlisle v. South Eastern R. Co.*, 1 Macn. & Goid. 689 ; 19 L. J., Ch. 477 ; *Edwards v. Shrewsbury and Birmingham R. Co.*, 2 De Gex & Sm. 537.

(a) 1 Sim., N. S. 550 ; 20 L. J., Ch. 537 ; see also *Winch v. Birkenhead R. Co.*, 16 Jur. 1035 ; *Bapshaw v. Eastern Union R. Co.*, 7 Ilac, 114 ; 19 L. J., Ch. 410 ; 2 Macn. & G. 389 ; *Yells v. Norfolk R. Co.*, 3 De Gex & Sm. 203 ; *Hare v. London and North Western R. Co.*, 30 L. J., Ch. 817 ; 2 Johns. & Hemm. 80 ; *Hoole v. Great Western R. Co.*, 16 W. R. 260 ; L. R., 3 Ch. 262 ; *Great Western R. Co. v. Rushout*, 16 Jur. 238 ; 5 De Gex & Sm. 290.

(b) See *White v. Cwmachlan and Cardigan R. Co.*, 33 L. J., Ch. 93 ; 1 Hemm. & Mill. 786 ; *Hoole v. Great Western R.*

*Co.*, *ubi supra*. If he seek to set aside an allotment of shares on the ground of misrepresentation in the prospectus, he should sue on his own behalf. *Hallows v. Fernie*, *ubi supra*. As to a suit by a preference shareholder on behalf of himself and all other shareholders, see *Cramer v. Bird*, L. R., 6 Eq. 143.

(c) *Forrest v. Manchester, Sheffield and Liarolshire R. Co.*, 30 Beav. 40 ; 7 Jur., N. S. 387 ; *Fisher v. London, Brighton and South Coast R. Co.*, 1 Hemm. & M. 180.

(d) *Hare v. London and North Western R. Co.*, 30 L. J., Ch. 836 ; 2 J. & H. 80 ; *Beman v. Rufford*, *ubi supra* ; *Salomons v. Laing*, *ubi supra*. It is submitted that an older dictum of Knight Bruce, L. J., contra, in *Rogers v. Oxford, W. & W. R. Co.*, 2 De G. & J. 662, cannot now be taken to be law. See *Scaton v. Grant*, 36 L. J., Ch. 638.

(e) L. R., 3 Ch. 337.

a purchaser of 500l. extension stock, receiving the benefit of the dividend out of the monies furnished by K., of which he now complains. Very soon after his acquisition of shares he commences operations against the company by filing his bill. However questionable the mode of the plaintiff's introduction to the company may have been, he has an actual interest in the subject-matter of the suit. In this respect he differs from the plaintiff in *Forrest v. Manchester, &c. R. Co.* who stated in his examination that the directors of a rival company directed the institution of the suit and indemnified him against the costs, and Lord Westbury dismissed the bill on the ground that the plaintiff coming in the character of a shareholder in the company, and stating that it was not his own act, but an act that he had been directed to do by the other company, the suit was an imposition on the Court. The plaintiff may properly be described in the words of K. Bruce, L. J., in *Rogers v. Oxford, W. and W. R. Co.*, as 'a person who has made himself a shareholder in the company for the mere purpose of instituting this litigation.' But if the question put by Wood, V.-C., in *Filler v. London, Brighton and S. C. R. Co.*, is repeated in this case, 'Is the suit *bona fide* the plaintiff's own suit, or is he merely the hand by which some one acts?' the correct answer must be—he consented to become the instrument of others, but for that purpose he has acquired an interest which gives him a common cause with them. I cannot say that having chosen to place himself in this invidious position with a real interest (though of no great amount) at stake, he is not to have the ordinary rights of a plaintiff on account of the motives which led him to acquire the means of appearing in that character."

And if a shareholder neglects to apply for relief against any proceeding of the company, which is in excess of their powers, as soon as he is acquainted with the proceeding, he cannot afterwards obtain relief, at all events by injunction, because he will be deemed to have acquiesced in the steps taken (f). It would seem that the proper mode of obtaining relief in such a case would be to apply to the Board of Trade to take proceedings under the statute 7 & 8 Vict. c. 85, s. 17 (g).

Acquiescence.

In *Hare v. L. and N. W. R. Co.* (h), Wood, V.-C., thus classified the cases in which Courts of Equity interfere as between the shareholders and the company:—

Principles on which Court will interfere.

"This Court, in dealing between the shareholders and the company, has usually three classes of cases called to its attention; namely, the class of cases in which the directors are doing something *ultra vires* of the directors, *quid* directors, but still within the power of the company as a body; and in those cases the Court has said, we will not interfere, as in the case of *Foss v. Harbottle*, because, though they may be wrong to-day, the majority of the company may say they are right to-morrow. Then there is the class of cases where the whole company united has not the power to do the acts, either as regards the individual shareholders or as regards the public interest, or both. As regards the individual shareholders, take the case of applying part of the monies of the company for soliciting a new

(f) *Graham v. Birkenhead Junction R. Co.*, 2 Macn. & Girdl. 160; 20 L. J., Ch. 415; *Fyfe v. South Western R. Co.*, 1 Sm. & Giff. 112; *Hare v. L. & N. W. R.*

*Co.*, supra.

(g) See Vol. 2.

(h) 30 L. J., Ch. 829; 2 Johns. & Hamm. 80.

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bill. It has been held, that you cannot apply any of the monies of the company to the obtaining of a new bill because the shareholder has contracted to belong to a given company for a given object, and has not contracted to do more. I think it would be difficult to say the public, as distinguished from the shareholder, has any interest at all in that; probably the Attorney-General might interfere, but I can scarcely see the ground for public interference.

"Then there is the other class of cases, where you are applying the capital of the company to an enterprise in which you are not entitled to speculate as a corporate body, without being liable to the consequences incident to individuals who speculate; and that is the case of the Great Northern Railway Company carrying coals (i). In those cases where the public has an interest, the shareholder also has an interest: he of course has the same interest, or an interest in a higher degree, than in the case put of the money being applied to the passing of an act of Parliament extending his enterprise; and he may, as well as the Attorney-General, sue, and may sue with or without the Attorney-General, as he may be minded; and the Court there is in the habit of saying that it will interfere on behalf of one of the shareholders without much scruple as to his motive."

The general principles, therefore, upon which Courts of Equity will interfere, upon the application of shareholders, to prevent railway directors from exceeding their statutory powers, are well settled, though, as we shall presently see, considerable difficulty has arisen, and must hereafter arise, in applying those principles to the circumstances of particular cases, especially those which approach the boundaries of what is or is not lawful. The great principle which governs all these cases is this—that a railway company is a corporation established for a particular purpose, and the directors have no power to bind the corporation by entering into contracts for purposes foreign to the purposes for which the corporation was established; such contracts are *ultra vires*, and illegal (k).

This principle, however, still leaves unsettled a question of almost still greater importance and difficulty, the question, namely, what is or is not foreign to the purposes for which the company was established. In extreme cases this question is easy of solution; but, as in other questions of degree, as we approach the confines of rectitude our difficulties increase, till we find it impossible to lay down a rule applicable to all cases. In each case, therefore, the question must

The powers of a railway company are limited to the purposes for which it is established.

(i) *Attorney-General v. Great Northern R. Co.*, 20 L. J., Ch. 794; 1 Dr. & Sm. 154.

(k) See Companies Clauses Act, 1845, s. 65, post. Vol. 2; *Green v. Nicolson*, 27 L. J., Ch. 823. A distinction has been drawn by high authorities between contracts forbidden and contracts not authorized, and it has been said that, while shareholders can obtain the reversal of either kind of contract, it is only contracts forbidden which are void as between the company and third parties. See per Erie, C. J., in *Mayor of Norwich v. Norfolk R.*

*Co.*, 4 E. & B. 114, and per Blackburn, J., in *Taylor v. Chester and Midhurst R. Co.*, 36 L. J., Ex. 200, at p. 212; L. R., 2 Ex. 357, at p. 360. Montagu Smith, Keating and Lush, JJ., however, were of opinion that the distinction is not sound, *ib.*, at p. 369. The judgments of the House of Lords, L. R., 4 H. L. 623, do not turn upon the distinction, which, it is submitted, proceeds rather upon moral than legal grounds. As to the personal liability of directors for a breach of trust causing loss, see *Turpin v. Marshall*, L. R., 6 Eq. 112.

be determined by the Court taking into consideration the acts of Parliament constituting the company, and other peculiar surrounding circumstances.

But let us consider the general principle. In the early case of *Principle. Colman v. Eastern Counties R. Co. (l)*, Lord Langdale, M. R., *Colman v. Eastern Counties R. Co.* said—

“To look upon a railway company as in the light of a common partnership, and to be subject to no greater vigilance than common partnerships may be, would be greatly to mistake the functions which they perform, and the powers which they exercise, of interference with the public and private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit, which, notwithstanding all other sacrifices, is on the whole hoped to be obtained by the public, but the public interest being to protect the private rights of all individuals, and to save them from liabilities beyond those which the powers given by the several acts necessarily occasion, they must always be carefully looked to; and I am clearly of opinion, that the powers which are given extend no further than is expressly stated in the act, or necessarily and properly required, for the purposes which the act has sanctioned. How far those powers, which are necessarily or conveniently to be exercised for the purpose intended by the act, may extend, will very often be a subject of great difficulty. We cannot always ascertain what they are. Powers ample are given, for the purpose of constructing the railway—powers ample are given for maintaining the railway—powers ample are also given for doing all those things which are required for the proper use of the railway; but it has nowhere been stated that a railway company have power to enter into all sorts of transactions. Indeed, it is admitted, that they have not a right to enter into new trades, not pointed out by the act. But it is contended, that, without limit, they have a right to pledge the funds of the company, for the encouragement of other transactions, however various and however extensive, provided only they profess that that encouragement, being occasioned by the liability of their own shareholders, the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. Surely, that has nowhere been stated; there is no authority for anything of that kind. What has been stated is, that those things to a small extent have frequently been done since the establishment of railways. Be it so;—but unless those acts so done can be proved to be in conformity with the powers given by the acts of Parliament under which those acts are done, they furnish no authority whatever.”

In accordance with these principles, an injunction was granted to restrain the directors of a railway company from entering into contracts, or applying funds belonging to the company in making payments in pursuance of contracts of indemnity, which were about to be given by the directors to a steam-packet company, who proposed to establish a line of passenger ships in communication with the railway (m). So it is clearly unlawful, and a breach of trust, if the

*Illustrations of the principle.*

(l) 10 Deav. 1; 16 L. J., Ch. 73. See also *Cardale v. South Eastern R. Co.*, 2 Hall & Twells, 386; 19 L. J., Ch. 177; 8 Railw. C. 670; *Salomons v. Laidy*, 19

L. J., Ch. 225.

(m) *Colman v. Eastern Counties R. Co.*, ubi supra. But where a railway company was bound to keep up steam-vessels for the

*Y. Control of Shareholders over Director.*

*Subscriptions.*

*Tomkinson v. South Eastern R. Co.*

directors, without any authority from Parliament, subscribe for or purchase shares in another railway (*n*).

A company may not subscribe out of its funds to Exhibitions or Institutions. This undoubted restriction is well illustrated by *Tomkinson v. South-Eastern R. Co.* (*o*). In that case the directors had been authorized at a meeting of the proprietors by more than 10,000 votes against 175, to subscribe 1,000*l.* to the "Imperial Institute," it being provided in the authorising resolution that any dissentient shareholder might have his proportion returned to him with his next dividend warrant. The plaintiff, a holder of 500*l.* Deferred Stock, whose interest in the subscription would be represented by about 13*d.*, easily obtained an interlocutory injunction from Kay, J., restraining the payment of the 1,000*l.*, although it was urged for the company that the Imperial Institute would augment their traffic (*p*).

*It makes no difference that the misappropriation of the funds will be beneficial to the company.*

In another case an injunction was granted, on the application of a shareholder, to restrain the directors of a railway company from expending any portion of the capital, in promoting a bill in Parliament for improving a navigation upon which the railway company were empowered to erect wharfs and warehouses; although it was admitted that it would have been very beneficial and advantageous to the company, that the navigation should be improved in the manner proposed by the bill (*q*).

Upon similar principles it was held by the House of Lords (*r*), reversing a decision of the Court of Session in Scotland, that a railway company was not liable upon an agreement entered into by the projectors of it to contribute funds for constructing and enlarging a pier and harbour.

*Dealing in coal restrained.*  
*Attorney-General v. Great Northern R. Co.*

So again, upon an information filed at the relation of a shareholder (*s*), against a railway company (*t*) alleging that they bought and

purposes of a ferry, it was held that those steamers, when not employed for the ferry, might be used for excursion trips, and were not bound to remain idle when not wanted for the ferry. *Forrest v. Manchester, Sheffield and Lincolnshire R. Co.*, 30 Beav. 40; affirmed on the ground that the suit was illusory, 7 Jur., N. S. 887. And in *South Wales R. Co. v. Redmond*, 10 C. B., N. S. 675, the Court of Common Pleas went so far as to hold that the plaintiffs might contract with the defendant that the defendant should run a steamer from Milford Haven to Cork for the accommodation of the through traffic of the plaintiffs. The case was decided upon demurrer. Any shareholder, however, might have restrained the company by injunction.

(*n*) *Grat Eastern R. Co. v. Turner*, L. R., 8 Ch. 149; 41 L. J., Ch. 634.

(*o*) *Tomkinson v. S. E. R. Co.*, L. R.,

35 Ch. D. 675, per Kay, J.

(*p*) It was stated that "railway companies in general had been accustomed to contribute to the funds of objects likely to increase traffic on their lines, such as race-meetings and regattas." Such contributions would seem to be illegal.

(*q*) *Munt v. Shrewsbury and Chester R. Co.*, 20 L. J., Ch. 169.

(*r*) *Caledonian and Dunbartonshire R. Co. v. Helensburgh Harbour Trustees*, 2 M<sup>l</sup>. 301; and see post, as to the effect of agreements by promoters to bind company afterwards incorporated, Chap. IV. Sect. 1.

(*s*) Said to have been a coal-merchant by Baggallay, L. J., in *Attorney-General v. Great Eastern R. Co.*, L. R., 11 Ch. D. at p. 500.

(*t*) *Attorney-General v. Great Northern R. Co.*, 29 L. J., Ch. 794; 1 Dr. & Sm. 454.

sold coal for profit, Sir R. Kindersley, V.-C., granted an injunction to restrain the company from acting as coal-dealers, and in giving judgment, observed—

“An act of Parliament which constitutes a joint-stock company, (say a railway company,) may be for many purposes regarded as a contract with the public. It is true that it is a contract carried into effect through the medium or machinery of an act of Parliament, but it is in effect a contract between the promoters of that company and the public, and the company are bound by that contract; and although the act of Parliament which constitutes and incorporates the company, contains no prohibition in express terms against engaging in any business, except that of making, and maintaining, and using the railway, there is implied in every such act of Parliament a prohibition, or looking at it as a contract a contract against ever engaging in any other business than that of a railway company. It is clear that that is the rule of law in the absence of any negative provision whatever prohibiting the dealing in any other matters; and that principle has been acted on over and over again. It is acted on constantly as between the different shareholders in the company. A single shareholder, even if 500 out of 600 shareholders agreed to carry on a different business in addition to the railway business, and it was clearly for the benefit of the company, and if it was clear that they had made enormous profits from doing it, and were continuing to derive those profits,—a single shareholder has the right to say,—‘That if not our contract amongst ourselves,—you shall not do it;’ and he may come and get an injunction.”

And where an agreement provided for a number of things to be done, which were all for the purpose of accomplishing a certain object that was *ultra vires*, it was held by Kindersley, V.-C., that the parties had no right by virtue of that agreement, until they had obtained the authority of Parliament, to do even those acts which independently of the agreement, they did not require the authority of Parliament to do. But in granting an injunction to this extent, the V.-C. refused to restrain two directors appointed under the agreement from acting, on the ground that the shareholders had power to remove them, and that restraining them might be detrimental to the business and interests of the company (*v*).

*Both v. Earl of Shelburne.*

Where an agreement entered into by directors is partly illegal, the shareholders have a right to have it set aside so far as it is *ultra vires* (*c*).

And if an act is granted for the making of one entire line of railway, the company cannot abandon one portion of the line altogether, and expend the capital subscribed in making so much of the railway as they propose to complete. The rule is, that the obligation to complete the work is co-extensive with the authority to make it. No authority is given to substitute a less work, or part of the whole; and

*The obligation to complete a railway is co-extensive with the authority to make it.*

(u) *Hattersley v. Earl of Shelburne*, 31 L. J., Ch. 873.

(v) *Maucliff v. Midland R. Co.*, 32

L. J., Ch. 513; 1 Hearn. & Mill. 130.

See also *Glinch v. Financial Corporation*, 37 L. J., Ch. 221.

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it is therefore unlawful to apply the capital collected on the faith of the whole work being completed, in completing only a part of it (y). So, when a company had powers to construct several branch and extension railways, and to raise certain distinct sums for each work, and the directors, having abandoned one portion of the railway, proposed to use a portion of the capital raised for the abandoned works, for the purposes of the other works, Lord Cottenham, C., said he was clearly of opinion that the shareholders, who subscribed their money for the purposes of the entire undertaking, were entitled in equity to the interposition of the Court, for the purpose of restraining the company from so applying the money. And an injunction was granted (z).

It is clear, therefore, that a company have no right to engage or pledge their funds, or entangle their affairs, in unauthorized transactions, so as to place the existing funds in jeopardy; nor may they do so on the speculation that they may afterwards obtain parliamentary authority for doing acts which were unlawful at the time they were done (a).

*Delegation of  
powers illegal;  
Beman v. Rufford*

It is also unlawful for a company, without authority from Parliament, to delegate its powers to another company. Thus, in *Beman v. Rufford* (b), where a company had proceeded to a certain extent in making a railway, and being then in want of funds, entered into an agreement with another company, that, when the line was completed, it should be worked by that company, who should have perfect control, and exercise all the rights of the original company for twenty-one years, and find stock and work the concern,—Lord Cranworth,

(y) Per Lord Langdale, M. R., *Cohen v. Wilkinson*, 1 Macn. & Gord. 481; 18 L. J., Ch. 378; on appeal, 14 Jur. 491. But where a railway company were authorized to make a line with branches, and they completed a portion of the line, but abandoned other parts of it, this is not a public mischief which entitles the Attorney-General to file an information, to prevent the company from opening the portion of the line which is completed, until the whole is perfect. *Attorney-General v. Birmingham Junction R. Co.*, 16 Jur. 113.

(z) *Bayshaw v. Eastern Union R. Co.*, 7 Hare, 114; 19 L. J., Ch. 410; 6 Railw. Cas. 152. But in *Hodgson v. Earl Powis*, 12 Beav. 392; 19 L. J., Ch. 418, Lord Langdale, M. R., intimated that if the thing sought to be done, although illegal, would be nevertheless beneficial to the purposes which Parliament had intended, and also to the parties, he should be disinclined to grant an injunction. See also *S. C.* on appeal, 21 L. J., Ch. 17, where Lord Cranworth, L. J., expresses a similar

opinion. But in *Caledonian and Dumbartonshire R. Co. v. Helensburgh Harbour Trustees*, 2 M'Q. 418, Lord Cranworth, L. C., said, "The question is not whether it will be beneficial, but whether it will be beneficial in the mode sanctioned by the act." When acquiescence in the proceedings of the directors will bar shareholders from applying for an injunction, see *Graham v. Birkenhead Junction R. Co.*, 1 Macn. & Gord. 160; 20 L. J., Ch. 445. *Hodgson v. Earl Powis*, 21 L. J., Ch. 17. *Sharpley v. Louth and East Coast R. Co.* L. R., 2 Ch. D. 663, C. A.

(a) *Logan v. Earl of Courtown*, 20 L. J. Ch. 347. And what the directors cannot do after the formation of the company certainly the provisional directors cannot do before for the purpose of binding the company. *Caledonian and Dumbartonshire R. Co. v. Helensburgh Harbour Trustees*, ubi supra; *Leominster Canal Navigation v. Shrewsbury and Hereford R. Co.*, 26 L. J., Ch. 784.

(b) 1 Sim., N. S. 556; 20 L. J., Ch. 537; 7 Railw. Cas. 48.

V.-C., held that this agreement was illegal, and restrained the parties from carrying it into execution. The ground of the decision was, that it was not competent for a company, who had obtained parliamentary powers, to delegate these powers to another company; and this principle is now clearly established by later decisions. Thus, upon an application for an injunction to restrain a company from obstructing the engines of another company from passing on the line of the defendant's railway, upon the ground that the latter had, by agreement, given the plaintiffs a right to run their trains on the defendant's railway, and to use their stations and other conveniences, and it being necessary, in support of the plaintiffs' case, to refer to an agreement between the plaintiffs and a third company, which gave the plaintiffs certain rights over a line of railway adjacent to the defendants' railway, Sir G. Turner, V.-C., refused the injunction, on the ground that the latter agreement was illegal. The learned judge observed:—

Delegation of powers to another company.

“There lies at the root of this case a question of public policy, which precludes the interference of the Court. It is impossible to read the agreement between the plaintiffs and the East Anglian Co. without being satisfied that it amounts to an entire delegation to the plaintiffs of all the powers conferred by Parliament upon the latter company. All the stock of that company is to be taken by the plaintiffs, without any obligation to restore it. The plaintiffs are to manage and regulate the railways of the East Anglian Co., for the purposes of the agreement; and, although in form it is declared that the instrument shall not operate as a lease or agreement, it amounts in substance either to one or the other. It is framed in total disregard of the obligations and duties which attach to these companies, and is an attempt to carry into effect, without the intervention of Parliament, what cannot lawfully be done, except by Parliament, in the exercise of its discretion, with reference to the interest of the public” (c).

So where by an agreement the L. and N. W. R. Co. agreed for a term of ninety-nine years to work the lines of the Birkenhead Co., using the property and plant of the latter company, except certain specified lands, and the said company were also to fix the fares and rates of charge, and the L. and N. W. Co. were to be allowed a certain specified sum for working expenses, and at the termination of the agreement the property and plant were to be restored of the same working value; and there was also a stipulation that a joint committee should be appointed, but not to exercise powers inconsistent with the acts of Parliament of the respective companies; Sir J. Parker, V.-C., decreed that this agreement was not within the power of either of the companies, inasmuch as it was impossible that it could be carried out, without delegation or transfer to the L. and N. W. Co. of some at least of the duties and powers which were given

*Witch v. Birkenhead R. Co.*

(c) *Great Northern R. Co. v. Eastern Counties R. Co.*, 9 Hare, 309 21 L. J., Ch. 437.



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exclusively to the other company; and that although the B. Co. were not called upon to be carriers, nevertheless the working the line was a duty imposed upon them by act of Parliament. The B. Co. had therefore agreed to part with statutory powers, which they had no authority to part with, and to a body which, by their constitution, had no authority to accept them (*d*).

Working agree-  
ment.

But although a lease of the line to another company is illegal, an agreement giving another company full power to work the line is not illegal, if it be not exclusive of all other companies, and be determinable on notice. So it was held in *Llanelli Railway and Dock Co. v. London and North-Western Railway Co.* (*e*), in which the distinction between legal and illegal agreements was thus put by James, L. J. :—

“I cannot allow that it is the same thing, whether there is an agreement which practically amounts to a lease, and which by contract prevents the entering into an agreement with other companies, and an agreement which has no such exclusive clauses in it. The difference is, that at any moment at which the Hereford Committee think it for their advantage to work their own line, or think it for their advantage to enter into a contract with any other company, there is nothing in the agreement to prevent them doing so.”

And with regard to the 87th section of the Railways Clauses Act, 1845, upon the application of which the decisions in this class of cases must be taken to depend, the learned judge observed :—

“I think that section is clearly reciprocal, and not a clause which only enables the company which is the owner of the line to enter into an agreement to enable another company to send its engines and carriages along the line, but it also enables the other company reciprocally to enter into the agreement” (*f*).

And an agreement for running powers and consequent apportionment of profits may be perpetual; and such an agreement, if containing no clause as to notice, will be construed as perpetual, and held binding (*e*). “Agreement for the division of receipts from through traffic, according to certain mileage proportions, with an allowance for working expenses where working expenses are incurred” by the running company, is “entirely such an agreement as was contemplated by the 87th section of the Railways Clauses Act, 1845 (*g*), and that although the staff of the running company may have the use of the owning company’s stations.”

(*d*) *Winch v. Birkenhead R. Co.*, 16 Jur. 1035; 5 De Gex & Sm. 562; 7 Railw. Cas. 381. See also *Simpson v. Denison*, 10 Harc. 51; 16 Jur. 528.

(*e*) *Llanelli Railway and Dock Co. v. L. & N. W. R. Co.*, L. R., 7 H. L. 550; 45 L. J., Ch. 539; 32 L. T. 575, affirming

both the decisions below, L. R., 8 Ch. 942; 42 L. J., Ch. 881.

(*f*) *Millard R. Co. v. G. W. R. Co.*, L. R., 8 Ch. 811; 42 L. J., Ch. 438; 28 L. T. 718; 21 W. R. 657, reversing Lord Romilly, M. R.

(*g*) Per Lord Cairns, *ib.*

Great litigation, leading to great difference of opinion amongst some of the most eminent judges, has arisen out of agreements between railway companies for regulation of traffic and division of profits. Upon this subject it must first be observed, that, independently of the 87th section of the Act of 1845, or their special acts, railway companies have no power to enter into such agreements at all (h); and further that, in more recent times, such agreements (unless made under the powers of the Act of 1845), even when authorized by a special act, will usually require the sanction of the shareholders and the approval of the Railway Commissioners. Whether the agreements are subject to these restrictions or not will depend on whether they are authorized by a special act, either incorporating Part III. of the Railways Clauses Act, 1863 (i), or itself containing similar provisions.

"Joint-purse" agreements.

With regard to the series of complicated cases referred to in the note (k), it appears that in *The Shrewsbury and Birmingham case* it was held that an agreement, ostensibly founded on the 87th section of the Act of 1845 (which plainly does not authorize such an agreement), between companies owning, not lines which formed parts of a continuous route, but lines which formed independent routes between the same termini, was held valid at law, and not reversible, but also not enforceable in equity. *Here's case* was an attempt by a shareholder to set aside an arrangement called the "octuple arrangement," whereby one set of companies owning lines which formed the west coast route from London to Scotland, arranged with another set, owning lines which formed the east coast route, to divide the profits of the whole traffic in certain fixed proportions for fourteen years. After an elaborate review of the authorities, Wood, V.-C., held that

*The Shrewsbury and Birmingham case*.

(h) Per Lord Cranworth, C., in *Shrewsbury and Birmingham R. Co. v. L. & N. W. R. Co.*, *id.* infra.

(i) 26 & 27 Vict. c. 92, ss. 22—29; Regulation of Railways Act, 1873, 36 & 37 Vict. c. 48, s. 10, post, Appendix. See post, Chap. XI., "Jurisdiction of the Railway Commissioners."

(k) *Shrewsbury and Birmingham R. Co. v. L. & N. W. R. Co.*, 2 Macn. & Gord. 324; 8 C. 2 Hall & Tw. 257; 3 Macn. & Gord. 70; 17 Q. B. 652; 16 Beav. 411; 4 De Gex, M. & Gord. 116; 6 H. L. C. 113; 20 L. J., Ch. 90; 21 L. J., Q. B. 89; 22 L. J., Ch. 682; 26 L. J., Ch. 482; *Hare v. L. & N. W. R. Co.*, 2 Johns. & Hemm. 80; 30 L. J., Ch. 817; *Midland R. Co. v. L. & N. W. R. Co.*, 35 L. J., Ch. 831; L. R., 2 Eq. 521. The above are cases in equity. There have also been a great number of cases at law, which have been decided upon somewhat similar principles. But, in these cases, the question has arisen

between *third parties* and railway companies, and the decisions have sometimes been influenced by considerations which do not apply to cases in which the question arises between shareholders and directors, which are analogous to questions between partners *inter se*. The cases are: *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775; 21 L. J., C. P. 23; 16 Jur. 219; 7 Railw. Cas. 150; *Gage v. Newmarket R. Co.*, 18 Q. B. 157; 21 L. J., Q. B. 398; *McGregor v. Dover and Deal R. Co.*, 18 Q. B. 618; 23 L. J., Q. B. 69; *South Yorkshire R. and River Don Co. v. Great Northern R. Co.*, 9 Exch. 55, 612; *Mayor of Norwich v. Norfolk R. Co.*, 4 E. & B. 397; *Dootick v. North Staffordshire R. Co.*, 4 E. & B. 798; 25 L. J., Ch. 325; *Sturges v. Eastern Counties R. Co.*, 22 L. J., Ch. 77; 5 H. L. C. 381; *Taylor v. Chichester and Midhurst R. Co.*, L. R., 4 H. L. 628.

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the arrangement could not be set aside. It is to be remarked that the elaborate judgment of Wood, V.-C., in the latter case, proceeded partly on the authority of the former; and it is submitted with diffidence that both agreements constituted a quasi-partnership, and were *ultra vires* and void. It appears at all events that "joint-purse agreements," *i.e.*, agreements "to divide the profits arising from any particular traffic in certain fixed proportions, without reference to the question whether it has actually travelled over the line or by the trains of one company or the other," are now considered unsafe. In the Report of the Joint Select Committee on Railway Amalgamation of 1872, it is observed on this subject—

"Whether division of traffic receipts on the joint-purse principle is valid at law or not is open to considerable doubt. It is clear that the Courts will not set aside such an arrangement on the ground that it is illegal in the sense of being contrary to public policy. But the doubt is whether such an arrangement, which is in fact a sort of partnership, is not *ultra vires* of each company, and whether it may not therefore be set aside at the instance of a shareholder. This doubt, the committee are advised, is such as to make it unsafe for companies to enter into such agreements without the sanction of Parliament, although there is evidence that they sometimes do so."

Same fares  
between com-  
petitive stations.

The object aimed at by agreements of this character is frequently and more easily obtained by competing companies agreeing to charge the same fares between competitive stations; and it would seem that such an agreement is unimpeachable.

Application for  
extension bill.

The directors of a railway company have clearly power to apply to Parliament for an extension bill. And it is equally clear that the High Court has power to restrain an improper application to Parliament, although the power has never been in fact exercised, and, as was observed by the Court in a case of a very special character (*l*), it is difficult to conceive an instance in which it would be right for the Court to exercise that power. And the Court has even refused to restrain applications made in breach of covenants not to apply (*m*).

Expenses may  
not be defrayed  
out of funds of  
company.

But notwithstanding the Wharnccliffe Order (which provides for the submission of every extension bill to a meeting of shareholders), it is well established that, although directors may promote extension bills they may not defray the expenses of such bills out of the funds of the company (*n*). In one very peculiar case, however (*o*), in which a large majority of shareholders had agreed to sell a canal

(*l*) *Louisa, Chatham and Dover Railway Arrangement Act*, L. R., 5 Ch. 671, reversing *Strait*, V.-C., *ib.* p. 672, n.

(*m*) See the two last cases cited in the next note.

(*n*) *Munnell v. Midland and Great Western of Ireland R. Co.*, 32 L. J., Ch. 513; *Stevens v. South Devon R. Co.*, 20 L. J., Ch. 491; 15 Jur 535; *Simpson v.*

*Demson*, 16 Jur 828; *Vince v. East Lancashire R. Co.*, 3 K. & J. 50; *Great Western R. Co. v. Rushout*, 16 Jur. 238; *Stockton and Hartlepool R. Co. v. Leeds and Thirsk R. Co.*, 2 Ph. 666; *Lancaster and Carlisle R. Co. v. L. & N. W. R. Co.*, 2 K. & J. 293.

(*o*) *Mathias v. Mills and Berks Canal Navigation Co.*, 34 L. T. 316.

which paid no dividend, and one shareholder out of a very small minority sought to restrain the company from promoting a bill to confirm the sale, *Malins, V.-C.*, while fully recognizing the principle above laid down, appeared to be of opinion that the funds of the company might be spent upon the bill with the leave of the Court. It may be remarked in connection with this case, that dissentient shareholders may be heard against a bill both before the examiners and before committees (*p*).

If the bill passes into an act, the act will ordinarily contain a clause\* charging the expenses on the corporate funds; but if the bill be unsuccessful, it is hard to see how an application by a dissentient shareholder to restrain the payment of the expenses of soliciting the bill out of the corporate funds of the company could be resisted, and an interim injunction restraining a company from paying the expenses of promoting an extension bill out of the capital of the company has been granted, at the instance of preference\*shareholders, notwithstanding a compliance with the *Wharfedale* order (*q*). Nor does any decided case establish that a railway company may employ its corporate funds in opposing bills promoted by rival companies or otherwise. Conservators of rivers (*r*) and commissioners of sewers (*s*) have been indeed allowed to expend corporate funds in opposing bills inimical to the interests under their charge; but in such cases there would be no shareholders to complain. It is obvious, however, that it is often the duty of the directors of railway companies to oppose bills in Parliament; and it is submitted that if a dissentient shareholder were to apply for an injunction to restrain the defraying of the expenses out of the corporate funds, the Court would probably give a liberal construction to the 65th section of the Companies Clauses Act, and would hold that the matter was one for the consideration of auditors (*t*).

Expense of extension bill.  
\* Page 27, ante.

Of opposing bill of rival company.

The distinction between applying for a bill and defraying the expenses of soliciting it out of corporate funds proceeds upon the fiction that the promoters and the shareholders are, *quod* the bill, distinct persons. It is as plainly illegal for all partners, except one, to spend the partnership funds in seeking to alter the character of the partnership as it is legal for any one partner to spend his own money for that purpose. The distinction is well drawn in *Vane v. East Lancashire R. Co.* (*u*), by Wood, V.-C., in the following words:—

*Vane v. East Lancashire R. Co.*

(*p*) C. S. O. 83; L. R. O. 73, 101.

(*q*) *Calderhead R. Co. v. Solway Junction R. Co.*, 49 L. T. 526; 32 W. R. 161, per Bacon, V.-C.

(*r*) *Bright v. North*, 2 Phillips, 216.

(*s*) *R. v. Norfolk Commissioners*, 15 Q. B. 549; 20 L. J., Q. B. 121.

(*t*) It will be seen that head No. 9 of the schedule of Form of Accounts, prescribed by the Railway Regulation Act, 1868, § 1 & 32 Vict. c. 119, contains an item "Parliamentary Expenses."

(*u*) 3 K. & J. 60. The directors, in this case, proposed to issue new shares to de-

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Applications to  
Parliament to  
vary the consti-  
tution or objects  
of a company  
not illegal.

"I have no doubt of the power of an existing company to apply to Parliament for an extension of its line. But it is somewhat more than this if it applies the corporate funds to that purpose.

"What is called the Wharfedale Order (x) arose out of the proceedings before a Committee of the Lords on the Stockton and Darlington Railway Bill, one of the first in which I was engaged when at the bar. We succeeded in that case. Then Lord Wharfedale proposed as a Standing Order of the House, that before any such bill should pass the House of Lords in future, three-fifths of the shareholders (y) present at the meeting should consent to an application being made for such bill. I think no doubt has ever existed since that time that it is competent to the directors to apply from time to time to extend their line to other purposes wholly beyond that contemplated by the original act of incorporation, and that no resistance of any individual shareholder is of any avail, if the consent has been obtained which I have referred to.

"It afterwards came to be considered before this Court how far any part of the existing property of a corporation could be applied in payment either of preliminary expenses or of the expenses of passing a bill through Parliament. Mr. Bird (z) contended, that, if it was once admitted that the directors had power to come to Parliament for the act, all powers incidental to that must be inferred. It is quite clear that this is too large an inference, for instance, one of the most necessary consequences of applying for an act, viz. the incurring expenses, is just what this Court will not permit. If they apply to Parliament for an act, the Court will not prevent them from so doing on the ground of dissenting shareholders objecting to it: but they are not permitted to apply any portion of the funds towards any part of the expenses necessary for this new purpose. They cannot divert the fund to any purpose other than those sanctioned by the existing act of the corporation."

Power of com-  
panies to agree to  
an amalgama-  
tion.

In a case in which a suit was instituted in equity to enforce an agreement, whereby two existing companies agreed to amalgamate (u) their undertakings with a third company, and it was objected that, as the special acts contained no powers to authorize such a contract, the agreement was a nullity: Lord Cottenham, C., said—

"I am asked to treat this contract as a nullity, that is, to hold that all contracts which parties enter into, not having themselves the power to carry them into effect, therefore agreeing to apply to Parliament to give them such powers, are so utterly void that this Court will not even protect the property, until an opportunity shall be afforded for an application to Parliament. The effect of such a decision would be to nullify many family arrangements entered into—many with the sanction of this Court, but to give effect to which the powers of Parliament are indispensable. It would also nullify all contracts by projectors of companies before their act is obtained; and it is now twelve years since (h) I gave effect

to the expenses of an application for an extension bill.

(x) L. S. O. 61; C. S. O. 71.

(y) The orders require the consent of proprietors, holding at least three-fourths of the paid-up capital of the company represented at such meeting.

(z) One of the counsel.

(u) See post, Chap. XIV., and also the general clauses as to amalgamation in the

Railways Clauses Act, 1863, 26 & 27 Vict. c. 92, s. 36, post, Vol. 2.

(h) In *Edwards v. Grand Junction R. Co.*, 1 Myl. & Cr. 650; 6 L. J., Ch. 47. Doubts have, however, been thrown upon that case in the House of Lords; see *Irriston v. Liverpool, Manchester and Newcastle R. Co.*, 5 H. L. C. 605, and other cases considered post, Chap. IV., Sect. 1.

against the incorporated body, to a contract entered into by the projectors of it, before their act was passed, but in contemplation of its passing, and now there are many other cases to the same effect. I am, therefore, not prepared to say, that a contract so entered into and sanctioned, is to be treated as a nullity, because some of its provisions may require an act of Parliament to carry them into effect" (c).

In another case a railway company applied to Parliament for an act enabling them to take a lease of another railway, but the application being opposed by a rival company, on the ground that the proposed amalgamation would destroy the traffic then existing on the line of the objecting company, an agreement was made between the parties that the opposition should be withdrawn, that a mutual account of the traffic of the three companies should be kept, and the amount received be divided in certain proportions by the companies, and that the company taking the intended lease should not compete for any traffic which properly belonged to the other company. The act of Parliament was obtained, but the conditions of the agreement were not observed. Lord Cottenham, C., was of opinion that it could not be said that any fraud had been practised on Parliament, as it had often been decided that parties may come to a private arrangement between themselves as a ground for not opposing a bill; neither could it be objected that the companies had not full authority to enter into the stipulations contained in the agreement as to the regulation of the traffic (d). This case was finally sent by Lord Truro, C., to law, and the Court of Queen's Bench determined that there was nothing in the agreement contrary to the duty which the parties respectively owed to Parliament, or to the public, or to their own subscribers; as to the first point, it had been clearly settled that an agreement to withdraw opposition to a railway bill in Parliament for a pecuniary or other consideration, was not illegal; secondly, that it was not injurious to the public, by giving in effect a monopoly to one company, because the parties did not propose by their agreement to endeavour to prevent competition generally, but only that one company should not compete or interfere with the other, upon the particular line mentioned in the agreement, which was in effect the same as if two persons engaged in one trade should agree not to compete with each other within a particular district; and as to the last point, the stipulation to divide the profits might be greatly for the benefit of the shareholders, for without some such co-operation of the companies perhaps no profit would be made (e).

Agreement to withdraw opposition.

(c) *Great Western R. Co. v. Birmingham and Oxford Junction*, 17 L. J., Ch. 213; 5 Railw. Cas. 211.

(d) *Strensbury and Birmingham R. Co. v. L. and N. W. R. Co.*, 2 Hall & Twell, 257; 20 L. J., Ch. 90; 2 Macn. & G. 321; 3 Macn. & G. 70.

(e) *Strensbury and Birmingham R. Co. v. L. and N. W. R. Co.*, supra; 17 Q. B. 652; 21 L. J., Q. B. 89; 16 Jur. 311. This case subsequently came before Sir J. Romilly, M. R., who said he was bound by the decisions to hold that the agreement was not illegal; but he was of

8. *Restraint of  
Ultra Vires Acts  
by Third Parties.*

8. *Jurisdiction of the Courts to protect Third Parties or the Public  
against Illegal Acts of Railway Companies (f).*

Injunctions are frequently resorted to by third parties for the purpose of restraining railway companies from doing illegal acts. The general principle by which equity is guided in administering such relief, appears to be this, *i.e.* that where a company go beyond the powers which the legislature has given them, and interfere with the property of individuals, it is the duty of the Court to interfere for the purpose of strictly keeping the company within those limits which the legislature has thought proper to prescribe for the exercise of their powers (*g*).

Injunction to  
restrain deviation.

In the early case of *River Dun Navigation Co. v. North Midland R. Co.* (*h*), the application was to restrain a deviation. The Court refused the injunction upon the construction of the special acts of the company, but Lord Cottenham, C., observed :—

"I am not at liberty, (even if I were in the least disposed, which I am not,) to withhold the jurisdiction of this Court, as exercised in the first case in which it was exercised, that of *Agar v. Regent's Canal Co.* (*i*), where Lord Eldon proceeds simply on this,—that he exercised the jurisdiction of this Court for the purpose of keeping these companies within the powers which the acts give them; and a most wholesome exercise of the jurisdiction it is; because, great as the powers necessarily are to enable the companies to carry into effect works of this magnitude, it would be most prejudicial to the interests of all persons with whose property they interfere, if there were not a jurisdiction continually open and ready to exercise its power, for the purpose of keeping them within that limit which the legislature has thought proper to prescribe for the exercise of their powers. On that ground I should never be reluctant to entertain any such application. I think it most essential to the interests of the public that such jurisdiction should exist, and should be exercised whenever a proper case for it is brought before the Court, otherwise the result may be that, after your property has been taken and destroyed,—after your house has been pulled down, and a railway substituted in its place, you may have the satisfaction, at a future period, of discovering that the railway company were wrong. It would be a very tardy recompense, and one totally inadequate to the injury of which the party has to complain; and individuals would be made to contend with companies who often have vast sums of money at their disposal, and that too not the money of the persons who are contending. It is a most material point to consider, when you enter into a contest

opinion that, by the terms of the act, the agreement as to the grant and acceptance of a lease could not be enforced until the whole undertaking was completed, 10 Beav. 411. On appeal, however, the Lords Justices held the agreement *ultra vires*; 4 De G., M. & G. 115, and the House of Lords affirmed their decree. 6 H. L. C. 113.

(*f*) See also "Powers to construct Railway," Chap. IX, post, and "Jurisdiction of the Board of Trade," Chap. X, post.

(*g*) See *Webb v. Manchester and Leeds R. Co.*, 1 My. & Cr. 116; 1 Railw. Cas. 576; and post. Parties whose private rights are injured must apply to the Courts for redress, for they may not take the law into their own hands, and determine and enforce the mode and manner in which they would stop illegal proceedings. See *London and Brighton R. Co. v. Blake*, 2 Railw. Cas. 322.

(*h*) 1 Railw. Cas. 153.

(*i*) Coop. 77.

with an individual, whether he is spending his own money, or money over which he has a control, or in which he has a comparatively small interest. If these companies go beyond the powers which the legislature has given them, and in a mistaken exercise of those powers interfere with the property of individuals, this Court is bound to interfere. That was Lord Eldon's ground in *Jagar v. Regent's Canal Co.*, and I see no reason whatever to depart from the rule there laid down and acted upon; but then, of course, it must be a case in which the Court is very clearly of opinion that the company are exceeding the powers which the act has given them."

In accordance with the doctrine thus clearly laid down, injunctions have been obtained against railway companies in the following instances, viz., where lands are sought to be taken compulsorily after the time limited by the legislature, or lands not authorized to be taken (*k*); where an entry has been unlawfully made on lands authorized to be taken without paying the price (*l*); where roads, bridges, stations or other works are constructed contrary to the stipulations contained in the railway acts (*m*); where proceedings are commenced to take lands, or execute works, contrary to an agreement previously made between the parties (*n*); where works are without authority constructed, which have a direct tendency to injure adjoining lands (*o*); where roads are improperly obstructed or interfered with, by depositing materials thereon (*p*); and where more damage is done in carrying on the works than the necessity of the case requires (*q*). In all such and similar cases the remedy by injunction is applicable.

Injunctions generally.

It has been also decided, that if the Board of Trade, after inspecting a railway about to be opened under the powers conferred on them (*r*), direct the company to postpone the opening of the railway, and the company, notwithstanding the notice, proceed to open the railway for traffic, it is competent for the Attorney-General to apply to a Court of Equity for an injunction to restrain the company from using the railway (*s*). Sir J. Romilly, M. R., in granting the injunction,

Injunctions in the interest of the public.

(*k*) *Shone v. Commercial R. Co.*, 4 My. & C. 122; *Richmond v. North London R. Co.*, 37 L. J., Ch. 273, 580; L. R., 3 Ch. 679.

(*l*) *Hugh v. Gt. N. Western R. Co.*, 1 Railw. Cas. 277; *Robertson v. Same*, 1 Railw. Cas. 159; *Jones v. Same*, 1 Railw. Cas. 681.

(*m*) *Kepp v. London and Brighton R. Co.*, 1 Railw. Cas. 495; *Drill v. Hull and Selby R. Co.*, 1 Railw. Cas. 816; *Gordon v. Chatterton R. Co.*, 2 Railw. Cas. 812; *Attorney-General v. Eastern Counties R. Co.*, 2 Railw. Cas. 823; *London and Brighton R. Co. v. Cooper*, 2 Railw. Cas. 312; *Lord Peter v. Eastern Counties R. Co.*, 3 Railw. Cas. 367; *Chambers v. Gloucester R. Co.*, 1 Russ. & My. 181; *Manser v.*

*Northern and Eastern Counties R. Co.*, 2 Railw. Cas. 380.

(*n*) *Lord Peter v. Eastern Counties R. Co.*, 1 Railw. Cas. 162; *Duke of Norfolk v. Trarant*, 15 Jur 395; *Lord v. London, Chatham and Dover R. Co.*, 34 L. J., Ch. 101.

(*o*) *Thurson v. Parer*, 1 Railw. Cas. 81.

(*p*) *Scrymgeour v. London and Birmingham R. Co.*, 1 Railw. Cas. 480.

(*q*) *Manser v. Northern and Eastern Counties R. Co.*, *ubi supra*; *Attorney-General v. London and South Western R. Co.*, 3 De G. & S. 139.

(*r*) 5 & 6 Vict. c. 55, s. 6, post, Vol. 2.

(*s*) 7 & 8 Vict. c. 85, s. 17, post, Vol. 2.



8. Restraint of  
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by Third Parties.

refused to inquire into the sufficiency of the reasons which induced the Board of Trade to withhold their consent (*t*), and it is hard to see how these reasons could be inquired into by the Court, on mandamus or otherwise. So also an injunction has been granted, at the instance of the Attorney-General, to prevent a railway company acting as coal-dealers (*u*).

There is also another class of cases to which the remedy by injunction is applicable. It seems, that, if it can be clearly made out, that a railway company cannot perform the undertaking imposed upon them by the terms of the special act, an injunction may be obtained by an owner of property through whose lands the legislature has given the company a right to pass, to restrain the company from taking them (*x*). For, to take any more land, when the whole work can never be performed, is clearly injurious to the owner, and a substantial breach of the condition on which the legislature granted the right to do it. So, it has been said, that if the termini be changed, and, instead of proceeding to some great town or city, the railway were to terminate in some obscure village, the same result would follow (*y*). But to induce a Court of Equity thus to interfere, it must clearly appear that the parliamentary plan is finally abandoned (*z*), and that a real and substantial injury would be sustained by the complaining party, or that the work already completed cannot be beneficial to the public or shareholders (*a*).

Injunctions in  
the interest of  
traders.

And an injunction has been granted to restrain a company whose terminus was within the limits of a ferry, from conveying railway passengers across the river in steam-boats, in contravention of the rights of the owners of the ferry (*b*); and to restrain a canal company from affixing the corporate seal to a petition to Parliament for an act to convert a portion of a canal into a railway, and from applying any of the corporate funds to the proposed object (*c*).

Letting out  
rolling-stock to  
another com-  
pany; *Att.-Gen.*  
*v. G. E. R. Co.*

In *Attorney-General v. G. E. R. Co.* (*d*), the defendant company let out rolling-stock to the London, Tilbury and Southend Company;

(*t*) *Attorney-General v. Oxford, W. & W. R. Co.*, 2 W. R. 370.

(*u*) *Attorney-General v. Great Northern R. Co.*, 29 L. J., Ch. 791.

(*x*) *Agar v. Board of Regent's Canal Co.*, 1 Swanst. 211, n.; *Gray v. Liverpool and Bury R. Co.*, 10 Jur. 364. The company cannot be compelled to complete the railway: see post, Chap. IX., Sect. 6. It has been determined in equity, that, if a portion only of an entire undertaking be completed, the omission to complete the work is not a public injury which will authorize an injunction at the suit of the Attorney-General. *Attorney-General v. Birmingham and Oxford R. Co.*, 3 Marc. & G. 453; 10

Jur. 113.

(*y*) *Lee v. Mitner*, 2 Y. & Coll. 611; *Logan v. Earl of Courtown*, 13 Beav. 32.

(*z*) *Lee v. Mitner*, ubi supra; *Mayor of King's Lynn v. Pemberton*, 1 Sw. 244.

(*a*) *Hodgson v. Earl Powis*, 12 Beav. 529.

(*b*) *Gory v. Yarmouth and Norwich R. Co.*, 3 Haro. 593; 3 Railw. Cas. 524.

(*c*) *Chiliff v. Manchester and Bolton Canal Co.*, 2 R. & M. 480, n.; but see *Warr v. Grand Junction Waterworks Co.*, 2 R. & M. 470.

(*d*) L. R., 11 Ch. D. 457; 5 App. Cas. 474; 49 L. J. Ch. 546; 42 L. T. 810; 28 W. R. 760.

with whom they had a working agreement under a special act. Jessel, M. R., held this to be illegal, and granted an injunction to restrain the letting of rolling-stock, not being surplus rolling-stock. The Court of Appeal (*c*), *independently of the special act*, reversed this ruling, and the House of Lords (*f*) affirmed the decision of the Court of Appeal, but based their decision *upon the terms of the special act*.

In some cases, the Court, in consideration of the great inconvenience and delay which will be caused by granting an injunction, will put the parties under terms to obey the order of the Court, and make it a part of the order that, if default is made in complying with the order, the injunction shall issue (*g*). In such cases the Court will exercise its discretion according to circumstances; and although there may have been an infraction of the law, it will endeavour to do substantial justice to one party without imposing unnecessary hardship upon the other (*h*).

Injunction granted on terms.

So, where an injunction is applied for to prevent the use of things devoted to the public use, the Court will consider the amount of inconvenience likely to result if the injunction is granted, and will sometimes allow a partial and restricted use of the thing complained of whilst further proceedings are pending (*i*). In all cases of this description, particularly where the equity depends upon a legal right, the Court regards both sides of the question, and looks to see, according as the decision shall be for one side or the other, which way the least loss would fall upon either party (*k*). In accordance with this rule, where it appeared that a company had cut through a road to form a bridge across it, without having first provided another sufficient temporary road, which the special act required them to do, and an injunction was granted after the mischief was done, restraining the company from destroying the road, Lord Cottenham, C., being satisfied that the road would be restored as speedily by allowing the company to proceed with the works, as by requiring them to restore the road, suspended the injunction for three weeks (*l*).

When the amount of inconvenience arising from an injunction will be considered.

(*c*) L. R., 11 Ch. D. 460, diss. Hagglay, L. J.

(*f*) L. R. 5 App. Cas. 471; 49 L. J. Ch. 545.

(*g*) *Northam Bridge and Road Co. v. London and Southampton R. Co.*, 1 Railw. Cas. 553; *Spencer v. London and Birmingham R. Co.*, 1 Id. 159; *Jones v. Great Western R. Co.*, 1 Id. 681; *London and Birmingham R. Co. v. Great Junction Canal Co.*, 1 Railw. Cas. 224; *Attorney-General v. Eastern Counties R. Co.*, 3 Railw. Cas. 337.

(*h*) See *Jones v. Great Western R. Co.*, 1 Railw. Cas. 681; *Langford v. Brighton and Hastings R. Co.*, 4 Railw. Cas. 69;

*Shrewsbury and Birmingham R. Co. v. L. and N. W. R. Co.*, 20 L. J., Ch. 90; *Furness R. Co. v. Smith*, 1 De G. & S. 209; *Webster v. South Eastern R. Co.*, 6 Railw. Cas. 698; 20 L. J., Ch. 194; 1 Sim., N. S. 172; 15 Jur. 73.

(*i*) *Gordon v. Chatham and Great Western Feron R. Co.*, 2 Railw. Cas. 812.

(*k*) See *Attorney-General v. Mayor of Liverpool*, 1 M. & C. 208; *Hilton v. Lord Gwyrrilth*, Cr. & Ph. 297; *Cory v. Far-mouth and Norwich R. Co.*, 3 Hare, 593; *Furness R. Co. v. Smith*, 1 De G. & S. 209.

(*l*) *Spencer v. London and Birmingham R. Co.*, 1 Railw. Cas. 159.



years and a half without the plaintiff taking any steps to stop it; Wood, V.-C., refused an injunction on the ground of acquiescence, and his decision was upheld by the Lords Justices (q). Where, however, the proprietors of a turnpike road stood by while a railway company laid down temporary rails across their road, and employed wagons drawn by horses only on the temporary railroad for the purpose of carrying on the works, that is not such laches as will deprive the turnpike trustees of any right they have to an injunction to restrain the railroad company from using the railroad for public traffic with locomotive engines (r).

With regard to what constitutes that amount of laches which will deprive a party of his right to relief by injunction, it is difficult to state any positive rule. To a very considerable extent each case will be governed by its own particular circumstances (s); and it has been said on the subject, that there are two arguments invariably adduced by public companies (t):—if the plaintiff comes to the Court complaining of an injury at the first commencement, it is said that the damage is trifling and the motion frivolous and vexatious; if he waits until it has assumed a grave shape, it is then said that he has acquiesced, and is therefore precluded from complaining.

When an injunction is applied for, all the facts of the case should be fairly stated; if they are not, and the injunction is afterwards dissolved in consequence of the false representation of the case, the rule is, that the plaintiff will be subjected to pay the whole of the defendant's costs (u). Forgetfulness is no excuse (v). And if a party comes for an *ex parte* injunction, and misrepresents the facts of the case, he is not permitted to support the injunction by showing another state of circumstances in which he would be entitled to it (y). Upon this point, it has been said that the jurisdiction of the Court in granting *ex parte* injunctions is a very hazardous one, and one which, though often used to preserve property, may often be used to the injury of others; and it is right that a strict hand should be held over those who come with such applications (z).

The jurisdiction to interfere by way of mandatory injunction would seem to be confined to cases of probability of extreme or very serious

Laches.  
All facts must be stated.

Injunctions to prevent irreparable damage.

(q) *Swaine v. Great Northern R. Co.*, 9 Jur., N. S. 1196; S. C., on appeal, 33 L. J., Ch. 399.

(r) *Northam Bridge and Road Co. v. London and Southampton R. Co.*, 1 Railw. Cas. 653; 9 L. J., Ch. 277.

(s) Dwyer on Injunctions, 203; and see *Great Western R. Co. v. Oxford and Wolverhampton R. Co.*, 3 De G., M. & G. 341; *Effocks v. South Western R. Co.*, 1 Sm. & Giff. 142.

(t) *Innocent v. North Midland Canal Co.*, 1 Railw. Cas. 251, *arguendo*.

(u) *Millingworth v. Manchester and Leeds R. Co.*, 2 Railw. Cas. 187; *Stemple v. London and Birmingham R. Co.*, 1 Railw. Cas. 493.

(v) *Aulton v. Robinson*, 16 Beav. 355.

(y) *Greenhalgh v. Manchester and Birmingham R. Co.*, 1 Railw. Cas. 118.

(z) *Attorney-General v. Mayor of Liverpool*, 1 My. & Cr. 210.

*a. Restraint of  
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damage (a), but will be exercised when it is necessary to prevent irreparable damage: as where the defendants erected a barrier which materially injured the plaintiffs' traffic, and caused passengers to go further round and pass the defendants' station, in order to reach that of the plaintiffs (b).

*Company's  
jurisdiction.*

The jurisdiction of equity to restrain a railway company from so dealing in the course of its operations as to injure the property of another, is not taken away because it happens that the act incorporating the company points out, specifically, a mode in which a party complaining of its acts may obtain compensation (c).

But there must be some special ground for the interference of the Court, as that the act complained of is distinctly *ultra vires*. Where, by the special act, a company was required to construct such drains and other accommodation works as two justices should direct, Malins, V.-C., emphatically refused to restrain the company from permitting water intercepted by their works to flood the lands of the plaintiff (d).

*Injunction at  
suit of public  
body.*

A public body is held to be the best judge of its own injury. On this principle the conservators of the river Cam obtained an injunction to restrain a railway from taking a large quantity of water for their station from the Cam, and credit was given to their evidence that navigation would be impeded, against the evidence of the company that no appreciable effect would be produced (e).

*Remedy for a  
breach of an  
injunction.*

If an injunction be disobeyed by a railway company, a sequestration will in some cases be issued (f).

*Indictment.*

If in the construction of the railway works a public nuisance be created, the company are liable to be indicted, whether the nuisance be caused by non-feasance or mis-feasance (g).

*9. Criminal Law  
as to Directors.*

### 9. The Criminal Law applicable to Fraudulent Directors, &c.

By the 24 & 25 Vict. c. 96, s. 80, it is enacted, that trustees (h) fraudulently disposing of trust property (i) are guilty of a misdemeanour, and are liable on conviction to sentence of penal servitude,

(a) *Durall v. Peddie*, 5 L. J., Ch. 223; 1 L. R. 114; 21 L. J., Ch. 227; *Martin v. Frost* (M. R.), 16 W. R. 268. And see Indemnity Act, 1743, s. 25, sub s. 8.  
(b) *London and N. E. Railway Co. v. London and N. E. Ry. Co.*, 13 L. J., Ch. 479.

(c) *London and N. E. Ry. Co. v. London and N. E. Ry. Co.*, 1 R. & M. 181. *Davis on Injunction*, 225.  
(d) *London and N. E. Ry. Co. v. London and N. E. Ry. Co.*, 13 L. J., Ch. 479.

(e) *London and N. E. Ry. Co. v. London and N. E. Ry. Co.*, 13 L. J., Ch. 479.

*Romilly, M. R.*

(f) *Attorney-General v. Great Northern Ry. Co.*, 1 De G. & S. 75.

(g) *See R. v. Great North of England Ry. Co.*, 9 Q. B. 315, where a company was held to be liable to indictment for obstructing a highway. So contractors employed by the company may be indicted for causing a public nuisance, by crossing a public road with an insufficient bridge. *See Watkins v. Great Northern Ry. Co.*, 20 L. J., Q. B. 591; 18 Q. B. 961.

(h) For definition, see s. 1.

(i) See s. 1.

not exceeding seven or less than five years, or imprisonment for not more than two years, with or without hard labour. But no prosecution under this section can be commenced without the sanction of the Attorney-General, and if the prosecutor has already taken civil proceedings, the sanction of the Court or judge before whom such proceedings are taken is also required.

By four subsequent sections of the same act, whosoever, being Directors de die; in fraud with property, accounts; a director, member, or public officer of any public company, shall (1) fraudulently take or apply for his own use or benefit, or for any use or purposes other than the use or purposes of such company, any of the property *(k)* of such company; or (2) receive any of the property of such company otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of the company; or (3) shall, with intent to defraud, or books, destroy, alter, mutilate or falsify any book, paper, writing or valuable security *(l)* belonging to the company, or make, or concur in the making, of any false entry, or omit, or concur in omitting, any material particular in any book of account or other document; or (4) shall make, circulate, or publish, or concur in making, circulating or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of the company, or with intent to induce any person to become a shareholder, or to advance any property to the company, or to enter into any security for the benefit thereof, is also guilty of a misdemeanor, and liable on conviction to be punished as above. But these enactments do not exempt any person from making full discovery or answering questions in civil actions, or affect any civil remedies against the guilty parties who escape prosecution if they have been compelled to make disclosure by civil process, and whose conviction is not to be given in evidence against them in civil actions. or publishing fraudulent statements, guilty of a misdemeanor.

The above enactments apply to railway directors under the general description of officers of a "public company," but do not make express mention of them.

By the Railway Companies Securities Act, 1866 *(m)*, it is enacted, that there shall be put on every mortgage deed or bond made or given by a railway company, and on every certificate for any sum of debenture stock *(n)*, a declaration to the effect that the particular security is issued under the borrowing powers of the company, and is Railway Companies Securities Act, 1866. Declaration on mortgage deed.

*(k)* See s. 1.

*(l)* *Ib.*

*(m)* 29 & 30 Vict. c. 168, Appendix.

*(n)* "Debenture stock" includes mort-

gage preference stock and funded debt, and any stock or shares representing loan capital of a railway company, by whatever name called.

9. Criminal Law as to Directors.

Penalty if declaration omitted or false.

not in excess of the amount remaining to be borrowed; the declaration to be signed by two directors specially authorized, and by the company's "registered officer" (s. 14 and Sched. 2).

Any railway company delivering any such mortgage deed, bond or other certificate, without such a declaration being first put thereon, is liable, on summary conviction, to a penalty not exceeding 20*l.*; and any director or officer knowingly authorizing or permitting the omission, or signing a declaration knowing it to be false, is liable, on conviction on indictment, to fine or imprisonment, or on summary conviction thereof, to a penalty not exceeding 10*l.* (ss. 15—17).

10. Dividends.

Dividends must be declared out of profits alone.

10. Dividends.

It is to be remarked that dividends can only be declared out of profits, and it would be illegal to order a fictitious dividend (o). The Companies Clauses Consolidation Act, 1845 (p), provides that previously to every ordinary meeting at which a dividend is intended to be declared, the directors shall cause a scheme to be prepared, showing the profits (q) (if any) of the company, for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof as they may consider applicable to the purposes of dividend, among the shareholders, and shall exhibit such scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme: (Sect. 120.) No dividend may be made, whereby the capital stock will be in any degree reduced; but it is provided that the word "dividend" shall not be construed to apply to a return of any portion of the capital stock, with the consent of all the mortgagees and bond creditors of the company, due notice being given for that purpose at an extraordinary meeting to be convened for that object: (Sect. 121) (r). Before the profits are apportioned, the directors may set aside a sum to meet contingencies, or for enlarging,

(o) *Burns v. Bannell*, 2 House of Lords Cl. & 397.

(p) S & 9 Vict. c. 18, post, Appendix.

(q) Money borrowed by directors under the powers of their act is not payable out of the profits of the company; but debts incurred for materials on the line, and debts which would have been paid at the time they were contracted if the company had had funds, are deductions to be made from profits, and are payable before the net profits can be ascertained, and before any division can be made among the shareholders. *Corn v. Londonderry and Charcolton R. Co.*, 39 L. & C. 290.

So is money advanced by directors to the company for the necessary working of the undertaking, and interest thereon; their claim to be repouced such advances being similar to the claim of trustees to be repouced expenses properly incurred in the execution of their trust. *Ulster R. Co. v. Banbridge, Lisburn and Belfast L. Co.*, 16 W. R. 398; L. R., 2 Eq. 190.

(r) As to how far it is legal to charge any part of interest on debenture capital to capital account, see *Bloxham v. Metropolitan R. Co.*, L. R., 3 Ch. 337; and see *Ibid.* as to office expenses.

repairing or improving the works: (Sect. 122.) No dividend is payable in respect of any share until the calls payable on all shares held by the owner thereof are paid: (Sect. 123.)

By sect. 30 of the Railway Companies Act, 1867 (1), it is enacted that—

"No dividend shall be declared by a company until the auditors have certified (u) that the half-yearly accounts proposed to be issued contain a full and true statement of the financial condition of the company, and that the dividend proposed to be declared on any shares is *bona fide* due thereon, after charging the revenue of the half-year, with all expenses which ought to be paid thereout in the judgment of the auditors; but if the directors differ from the judgment of the auditors, with respect to the payment of any such expenses out of the revenue of the half-year, such difference shall, if the directors desire it, be stated in the report to the shareholders, and the company in general meeting may decide thereon, subject to all the provisions of the law then existing, and such decision shall for the purposes of the dividend be final and binding; but if no such difference is stated, or if no decision is given on any such difference, the judgment of the auditors shall be final and binding; and the auditors may examine the books of the company at all reasonable times, and may call for such further accounts and such vouchers, papers and information as they think fit, and the directors and officers of the company shall produce and give the same as far as they can, and the auditors may refuse to certify as aforesaid until they have received the same; and the auditors may at any time add to their certificate or issue to the shareholders independently, at the cost of the company, any statement respecting the financial condition and prospects of the company which they think material for the information of the shareholders."

Dividend not to be declared without audit of accounts.

Where a railway company earned profits sufficient to pay a dividend, and a dividend was declared accordingly, but in consequence of the surplus profits having been expended in satisfying liabilities on capital account there was no money in hand to pay the dividend, and the company in general meeting resolved to issue in lieu of dividend certain shares which by their act they had power to create, and which had already been created, but not issued; it was held, that such issue was ultra vires and illegal, and an injunction was granted by the Court of Chancery (x).

*Howe v. Great Northern Ry. Co.*  
Issue of shares in lieu of dividend.

The directors are personally liable to refund a dividend improperly paid. Where the net rental of surplus lands was about 30,000*l.*, and a dividend was paid as upon a conjectural value of 60,000*l.*, the directors were enjoined to make part of the difference good, but without prejudice to their right to recover the amounts back from the shareholders to whom those dividends had been improperly paid (y). And it was pointed out by James, V.-C., that the directors might deduct the over-payments from the next dividend warrants.

Liability of directors to refund.

(1) 30 & 31 Vict. c. 127, post, Appendix.

(u) As to the effect of the auditors' certificate, see *Bloxham v. Metropolitan R. Co.*, L. R., 3 Ch. 337.

(x) *Hoole v. Great Western R. Co.*, 16 W. R. 260; L. R., 3 Ch. 282.

(y) *Salisbury v. Metropolitan R. Co.*,

22 L. T. 839; 39 L. J., Ch. 429; see also *Erans v. Coventry*, 8 De G., M. & G. 535, and *Exchange Banking Co.*, 11 L. J., Ch. 21; 11 L. R. 21 (Ch. D. 519; 52 L. J., Ch. 217; from which it seems, that the liability is joint and several in respect of each dividend; that the Statute of Limitations



10. *Dividends.*

Each shareholder has a separate right to recover dividend.

After a dividend has been declared, each party entitled has a separate and independent right to recover it, and therefore, where a railway act provided that no dividends should be paid until the whole of a railway was opened for traffic, Lord Cottenham, C., decided that one shareholder could not sustain a bill, filed on behalf of himself and all other shareholders, for an injunction to restrain the payment of a dividend declared before the opening of the whole line (z). And by analogy with a series of decisions, as to the right to recover dividends arising from the public funds, each shareholder would seem to have a right of action against the company, to recover a declared dividend (a).

## Lien on shares.

Charge on shares by judgment creditor.

A lien on shares seems to give, as accessory thereto, a right to receive the dividends accruing therefrom (b). Shares in a railway company appear also to be within 1 & 2 Vict. c. 110, s. 14, and may therefore be charged with the payment of a judgment debt, by any Divisional Court or by any judge (c), and that although the owner is only a trustee and not beneficially interested. But as no proceedings can be taken to have the benefit of such charge until after the expiration of six calendar months from the date of the order, the *cestui que trust* must in the meantime apply to the Court for relief (d). By the 3 & 4 Vict. c. 82, the provisions of 1 & 2 Vict. c. 110, s. 14, are extended to the dividends arising from such shares.

On dividends under 3 & 4 Vict. c. 82.

## Apportionment of dividends.

The Apportionment Act (4 & 5 Will. 4, c. 22), has been held (e) not to apply to dividends on railway shares, but the Apportionment Act, 1870 (33 & 34 Vict. c. 35), clearly applies to such dividends. By sect. 7, the provisions of that act do not extend to cases where it is stipulated that no apportionment shall take place.

*1. At and North British Ry. Co. v. H. & M.*

In connection with the subject of dividends, we may observe that, in a case, where the shareholders of a railway company had resolved that a number of new shares about to be issued should be "at the disposal of the director," Sir J. Romilly, M. R., decided that the chairman of the board was not justified in retaining for his own benefit the amount of the premiums for which such shares were sold,

did not apply; and that the improper payment of dividends cannot be ratified by the shareholders.

(c) *Cutcliffe v. South Eastern R. Co.*, 6 B. & F. 470; 19 L. J., Ch. 477; 2 H. & T. 396. Nor will the Court restrain a company from paying a dividend, on the mere ground that the directors have acted in violation of the duty they owe to the public. *Lepp v. Manchester R. Co.*, 20 L. J., Ch. 197.

(d) *Price v. Lord of Enfield*, 2 Bing. 401. *Re South Kensington Land*, 2 Bing.

401.

(b) *Hague v. Dandeson*, 2 Exch. 741.

(c) See R. S. C. 1883, Order XLVI, r. 1. If shares be sold, a charging order obtained against the seller, after sale but before transfer, will have no effect, and the company are compellable to register the buyer as owner. *Gill v. Continental Union Ins. Co.*, L. R., 7 Ex. 332; 41 L. J., Ex. 170.

(d) See *Cygan v. Taylor*, 4 H. & C. 158.

(e) *Re Macneil*, 32 L. J., Ch. 333; 1 H. & M. 610.

although the full amount of the calls were subsequently paid to the company by the purchasers of the shares. The same learned judge expressed a doubt whether the shareholders could have even *expressly* authorized such an appropriation of the profits arising from these premiums (*f*).

The rights of the holders of preference stock and guaranteed shares are well illustrated by the following cases:—

Right of holders of preference stock and shares.

A railway company issued certificates of preference stock purporting to carry "interest" at 6*l.* per cent. per annum in perpetuity. Afterwards they obtained an act of Parliament, which (after reciting that preference stock had been created, whereby priority was assigned in the payment of "dividends" to the extent of 6*l.* per cent. per annum,) enacted, that the railway company should pay "dividends" to the holders of such stock, at the rate aforesaid, before they should pay any dividend to the holders of any other shares in the company. By a subsequent act, the company was empowered to issue other shares, called "debenture shares," bearing "interest" at 5*l.* per cent. per annum; and was directed to apply the annual profits in payment, first, of interest on mortgages; secondly, of interest on the debenture shares; thirdly, of the "interest or dividend" on the guaranteed or preference shares, and the arrears of such interest or dividends; and fourthly, as therein mentioned. A subsequent act referred to the preference shares, as bearing a "preferential interest or dividend." It was held by the Lords Justices, upon a bill filed by a holder of 6*l.* per cent. preference stock, that the provision as to payment of "dividends" in the first-mentioned act must be construed with reference to the recital in it and to the subsequent acts, and did not mean a share of current profits merely, but entitled the holders of the preference shares to resort to a subsequent division of profits, to make their dividend up to 6*l.* per cent. It was also held, that a preferential shareholder is entitled to file a bill to restrain the company from making a dividend prejudicial to his rights, without waiting until there are funds to make a dividend (*g*).

*Sturges v. Eastern Union R. Co.*

The stock in the Great Northern R. Co. consisted of ordinary and preference stocks, the latter being created in pursuance of different acts of Parliament, and entitling the holders to preference dividends at different rates per cent. per annum. An officer of the company from time to time, during a period of some years, fraudulently issued

Right to be paid out of other than annual profits.

*Henry v. Great Northern R. Co.*

(*f*) *York and North Midland R. Co. v. Hudson*, 10 Beav. 485; 22 L. J., Ch. 529. See *Thompson v. Hudson*, 30 L. J., Ch. 588.

(*g*) *Sturges v. Eastern Union R. Co.*, 7 De Mex. M. & Gord. 156. See also *Cory v. Belfast & County Down R. Co., Ir.*, 2 C.

L. 112. It is very doubtful indeed if it is competent to railway companies to create preferential shares under the general powers contained in ordinary Railway Acts. *Scoble*, they cannot, *Ibid.*; see now 26 & 27 Vict. c. 113, s. 13 et seq. post, vol. II.

10. Dividends.

fictitious stock of both kinds, which amounted in the whole to 220,000*l.* before the fraud was discovered. It not being possible to distinguish the genuine from the fictitious stock, an act of Parliament was obtained in 1857, by which the fictitious stock was declared valid; and it was enacted, that the directors should apply a sum of 243,000*l.*, which was applicable for profits up to December, 1856, in purchasing and cancelling stock equivalent to that which had been fraudulently created. It was then enacted, that it should be lawful for the directors to apply the balance of the 243,000*l.*, so far as the same would extend, in paying to the proprietors of the several classes of preference stock or shares the dividends to which they would have been entitled out of the said sum, if the same had been declared and apportioned as dividend, &c. The preference shareholders, not having received the full amount of their dividends in 1856, claimed to be paid the deficiency out of the first half-year's profits in 1857; but this claim was resisted by the directors and the ordinary shareholders, and thereupon a bill was filed to obtain an injunction to restrain the declaration of a dividend on the ordinary stock, without regard to the prior right of the preference shareholders to be paid the full amount of their dividend. And it was held by the full Court of Appeal (affirming a decision of Wood, V.-C.), that the preference shareholders were entitled to the injunction, it being considered that the right of preference shareholders was to have the full amount of their respective dividends before any payment in respect of dividends on the ordinary stock, and that the Act of 1857 had not deprived them of that right (*h*). In giving judgment, Lord Cranworth, L. C., said:—

“I have come to the conclusion, that what these statutes in fact guarantee to the favoured shareholders is a charge on all accruing profits, at the stipulated rate, before anything is divided among the ordinary shareholders. This is, substantially, *indebit*, chargeable exclusively on profits. There is nothing in such a use of the word ‘dividend’ which is at all at variance with ordinary usage. We speak of the *dividend*, payable on the 3*l.* per Cents., when in truth we mean no more than an annuity of 3*l.* chargeable upon and payable out of the public revenue.”

It is to be observed  
that the  
Great Northern R.  
Co. v. Great Northern R.  
Co. (1862) 10 L. J. 200;  
see also *London & North  
Western R. Co. v. Great  
Northern R. Co.*

By an act of Parliament it was enacted, that it should be lawful for any shareholder, who should have paid up one-half the amount of any share or shares in the Great Northern R. Co., to require each share to be converted into two half-shares, whereof the one-half which should be so fully paid up should be denominated “Deferred half-share;” and the other half of such share should be denominated

*Ch. H. & N. v. Great Northern R. Co.*, 27 L. J., Ch. 1, 1 De Gex & J. 606. See also *Ch. H. & N. v. London & North Western R. Co.*, 30 L. J., Ch. 290; 29 De G. 263; *Ch. H. & N. v. London & North Western R. Co.*, 37 L. J., Ch. 235.

"Guaranteed half-share;" and thenceforth, in respect of each whole share so divided, the whole of the interest and dividends which would in each year have accrued, should be applied in or towards payment in the first place of interest or dividend after the rate of 6l. per cent. per annum on the amount paid upon the half-share so denominated "guaranteed;" and the remainder, if any, should alone be payable to the half-share so denominated "deferred," provided that the company should not pay any other or greater amount of interest or dividend upon the two half-shares than was for the time being paid on each undivided share. It was held by Wood, V.C., that the holders of guaranteed half-shares were entitled to be paid their 6l. per cent. in each year, not only out of the dividends accruing in that year, but out of all subsequent dividends; and therefore, if in any year the dividends were more than sufficient to pay 6l. per cent. on the guaranteed half-shares, the surplus must be applied in payment in the first place of all arrears due on those half-shares in respect of past deficiencies, before any dividend could be declared on the deferred half-shares. And it was also held, that the owners of the guaranteed half-shares having in a former year acquiesced in the declaration of a dividend on the deferred half-shares, whilst there was an arrear of dividend due on the guaranteed half-shares, although they had precluded themselves from making any claim in respect of those particular arrears, had not thereby renounced their rights in respect of subsequent arrears (i).

But it is material to observe that many railway companies issuing preference shares under acts passed shortly before 1863, and most railway companies issuing such shares under acts passed after that time, are bound to pay dividends only out of the profits of each year. For the Companies Clauses Act, 1863, enacts that where any company is authorized by special act incorporating Part II. of that act, to issue new preference shares, such shares shall be entitled to interest out of the profits of each year, in priority to ordinary shares; but if in any year there are not profits available for the payment of the full amount of preferential interest for any one year, no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company (k).

Dividends on new preference shares, now usually contingent on profits.

In *Bouch v. Sevenoaks, Maidstone, and Tunbridge Wells R. Co.* (l), the defendants raised money by the issue of stock to complete a portion of their line. By an arrangement between the defendants and

Guarantee order on guaranteed dividend.

(i) *Matthews v. Great Northern R. Co.*, 28 L. J., Ch. 875. And see the series of cases reviewed in *Smith v. Cork and Brandon R. Co.*, 1. R., 3 Eq. 356; affirmed 1. R., 5 Eq. 66, where it was held that the

rights of the preference shareholders were not lost by lapses.

(k) 26 & 27 Vict. c. 118, s. 14, post, vol. II.

(l) L. R., 4 Ex. D. 133.

10. Dividends.

the London, Chatham and Dover R. Co., confirmed by act of Parliament, the line was worked by the latter, who undertook to provide the interest on the stock by half-yearly instalments. It was held that one of these instalments could be attached in the hands of the London, Chatham and Dover R. Co. to answer a judgment recovered by the plaintiff against the defendants.

Stamp on powers  
of attorney for  
receipt of divi-  
dends.

It may be convenient to mention in this place that by the Stamp Act, 1870 (33 & 34 Vict. c. 97, s. 3, and Sched.), the stamp duty payable on any letter or power of attorney for the receipt of dividends or interest "of any stock"—

	s. d.
Where made for the receipt of one payment only, is . . . . .	1 0
In any other case . . . . .	5 0

Letters under  
hand only not  
powers of  
attorney.

And by sect. 104 of the same act, a writing, under hand only, containing an order, request or direction from the owner or proprietor of any stock to any company, or to any officer of any company, or to any banker, to pay the dividends or interest arising from such stock, funds or shares to any person therein named, is not chargeable with duty as a letter or power of attorney.

11. Accounts of  
Company and  
their Audit.

8 & 9 Vict. c. 10  
Appendix.

11. The Accounts of the Company and their Audit.

With respect to the keeping the accounts of the company, the Companies (Clauses Consolidation Act, 1845, requires the directors to cause full and true accounts to be kept: (Sect. 115.) The books must be balanced at the times prescribed by the special act, or, if no time be there prescribed, fourteen days at least before each ordinary meeting; and an exact balance-sheet must be made up, with a distinct view of profit and loss on the preceding half-year: (Sect. 116.) The books and the balance-sheets are to remain open for the inspection of shareholders, and extracts may be taken: (Sect. 117.) And at the ordinary meeting, the balance-sheet and report of the auditors must be produced to the shareholders: (Sect. 118.) A book-keeper must be appointed to enter the accounts and keep the books, and if he fails to permit them to be inspected by shareholders, he may be fined 5*l.*: (Sect. 119.) Under the above provisions a shareholder may obtain an inspection of the books by mandamus, but the mandamus will not usually be granted unless the shareholder satisfy the Court that his application is a reasonable one with a reasonable object (*m*).

(*m*) See *Reg. v. Will. & Port. Canal Co.*, 3 A. & E. 179; *Reg. v. London and St. Katharine Docks Co.*, 31 L. T. 588.

Where an order was made by the Court of Chancery to allow the plaintiff, his solicitors and agents, to inspect the books of a

An annual account of receipts and expenditure, certified by the directors and auditors, must also be prepared; and, if required, a copy must be transmitted to the overseers of the parishes, and clerks of the peace of the counties, through which the railway passes; and the public may inspect such account. A penalty of 20*l.* is incurred by the company, if, when required, they neglect to transmit such account: (8 & 9 Vict. c. 20, s. 107) (*u*).

Annual account of receipts and expenditure to be prepared for overseers.

Before any person is entrusted with the custody or control of money, the directors must take sufficient security from him (*v*): (8 & 9 Vict. c. 16, s. 109.) Every officer, when required, must render an account of all monies received by him, and deliver the vouchers for all payments, and pay over the balance due to the directors: (Sect. 110) (*w*). If any officer fails to account, he may be summoned before two justices, who may determine the matter in a summary way, and adjust the balance owing, and order the officer to pay the amount, and, on default, levy the same by distress, or commit the offender to gaol for three months: (Sect. 111.) Or, if an officer refuses to deliver up vouchers, books, or other property, the justices may commit him until he does deliver them: (Sect. 112.) If an officer is about to abscond, he may be apprehended by warrant, instead of being summoned to appear before the justices: (Sect. 113.) But no such proceedings taken against an officer will deprive the company of any other remedy against the officer or his surety: (Sect. 114) (*x*).

Security to be taken from officers entrusted with money.

At the ordinary meeting after the passing of the special act, and every year afterwards, two auditors are to be chosen by the shareholders, unless a different number be prescribed by the special act: (Sect. 101) (*y*). One auditor goes out of office every year by seniority; but he is eligible to be re-elected: (Sect. 103.) If a vacancy among

Auditors to be chosen.

railway company, it was held that an accountant who was also auditor to a neighbouring railway was not such an agent. *Draper v. Manchester, Sheffield and Lincolnshire R. Co.*, 3 De Gex, F. & J. 23.

(*n*) As to accounts which must be kept for three years preceding the period when an option to purchase the railway arises, see 7 & 8 Vict. c. 35, s. 5; amended and extended to Ireland, 30 & 31 Vict. c. 104;—for the inspection of officers who collect excise duties, 5 & 6 Vict. c. 79, s. 6;—10 & 11 Vict. c. 42;—and for the purposes of the poor's rate, 8 & 9 Vict. c. 20, s. 107.

(*o*) When a bond remains in force, although the company becomes amalgamated, and what is a breach of the condition, see *London and Brighton R. Co. v. Goodwin*, 3 Exch. 320, 736; 6 Railw. Cav. 177. See also *Eastern Union R. Co. v.*

*Cochrane*, 9 Exch. 197.

(*p*) As to officers of dissolved companies on amalgamation, see 26 & 27 Vict. c. 92, s. 48, post, vol. II.

(*q*) Even in the absence of this clause, it seems that the officer would have been liable to be sued at law, notwithstanding proceedings had been taken under the statutory powers. See *Mayor of Liverpool v. Simpson*, 8 Q. B. 65; *Mallack v. Jenkins*, 21 L. J., Ch. 65.

(*r*) Where a company desire to make new provisions with respect to auditors, they may obtain a certificate from the Board of Trade for that purpose under the Railway Companies Power, Act, 1861. See the Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 38, post, vol. II. An auditor need not be a shareholder. (*ib.* s. 11.)

11. Accounts of  
Companies, and  
their Audit.

the auditors occurs during the current year, the shareholders may supply it: (Sect. 104.) Ordinary meetings for the election of auditors are subject to the same provisions as ordinary meetings for the election of directors: (Sect. 105.) The directors must deliver to the auditors the half-yearly or other periodical accounts and balance-sheet, fourteen days before the ensuing ordinary meeting at which they are to be produced (Sect. 106); and it is the duty of the auditors to examine them: (Sect. 107.) Accountants and other persons may be employed by the auditors, and the auditors may make a special report on the accounts, or simply confirm the same: (Sect. 108.)

Publication of  
accounts.

The principal enactments respecting the publication of accounts by railway companies are contained in the Regulation of Railways Act, 1868 (*s*). This important statute provides that every company (*f*), seven days at least before each ordinary half-yearly meeting, must (under a penalty not exceeding 5*l.* a day for non-compliance) prepare and print, according to the forms contained in the first schedule to that act, a statement of accounts and balance-sheet for the last preceding half-year, and an estimate of the proposed expenditure out of capital for the next ensuing half-year. The forms in the schedule, which may be altered by the Board of Trade with the consent of a company, are of a very detailed character. They provide for statements of original and debenture capital, showing the rate per cent. at which each loan was raised; statements of receipts and expenditure on capital account, showing the amount of subscriptions to other railways; return of rolling stock; statements of "revenue account," showing on the one hand the receipts from passengers, merchandize, and live stock, and on the other the expenditure on salaries, law charges, parliamentary expenses, compensation, rates and taxes and government duty; a general balance-sheet showing on the one hand debts due on Lloyd's Bonds, and to other companies, and on the other cash on deposit at interest, cash invested in consols and government securities; and a "mileage statement" showing the number of miles authorized, constructed and in actual working respectively (*u*). A printed copy of the accounts must be forwarded to the Board of Trade, and be given on application to every person who holds any ordinary or preference share or stock in the company, or any mortgage, debenture or debenture stock of the company; and every such person may at all reasonable times, without charge, peruse the original at the company's principal office.

Half yearly  
statement.

Supply of statement to  
shareholders.

(*s*) 31 & 32 Vict. c. 119, s. 3 et seq., post, vol. II.

(*f*) By sect. 2, the term "company" means a company incorporated either before

or after the passing of the act.

(*u*) Only the more important items are selected for notice in the text.

Any company which acts in contravention of this section is liable to a penalty not exceeding 50*l.*: (Sect. 4.)

If any statement is false to the knowledge of any person who signs the same, such person is liable to fine and imprisonment, or on summary conviction to a penalty not exceeding 50*l.*: (Sect. 5.)

The Board of Trade may appoint inspectors to examine into the affairs of a company and to report thereon upon application made by—(1) directors; (2) the holders of not less than two-fifths of the ordinary stock of the company; (3) the holders of not less than one-half of the aggregate amount of the mortgages, debentures, and debenture stock; (4) the holders of not less than two-fifths of the aggregate amount of the guaranteed or preference stock, provided that the preference capital issued amounts to not less than one-third of the whole share-capital of the Company: (Sect. 6.)

Examination of accounts by inspectors.

Such application must be supported by evidence, and the Board of Trade may require the applicants to give security for costs: (Sect. 7.)

Any director, officer, or agent refusing to produce books, &c. or to afford facilities for inspection, incurs a penalty of 5*l.* for every day during which the refusal continues: (Sect. 8.)

The report of the inspectors is to be printed and to be delivered to all shareholders, &c. who apply for it: (Sect. 9.)

Moreover, any company itself may, by resolution at an extraordinary meeting, appoint inspectors, having similar powers and duties with reference to the accounts of the company.

Power of company to appoint inspectors.

The same act provides (by ss. 11, 12) that an auditor need not in any case be a shareholder, and (by s. 12) that the Board of Trade may, "upon application made in pursuance of a meeting of directors, or at a general meeting of the company," appoint an additional auditor.

With respect to loan capital, it is directed by the Railway Company Securities Act, 1866 (*x*), that within fourteen days after the end of each half-year (*y*), every railway company shall make an account of their loan capital authorized to be raised and actually raised up to the end of that half-year, specifying the particulars described in the first schedule to that act. And the Board of Trade may from time to time prescribe the form in which such account is to be made. This loan capital half-yearly account may be perused at all reasonable times, without payment, by any shareholder, stockholder, mortgagee, bond creditor or holder of debenture stock of the company, or any person interested in any mortgage bond or debenture stock. Within twenty-one days after the end of each half-year

Loan capital accounts

(*x*) 29 & 30 Vict. c. 103, s. 5 et seq.

(*y*) By sect. 4, half-years end on 30th June and 31st December, but the Board of Trade may appoint other days for the ending of half-years.

to be deposited with registrar of joint stock companies.



11. Accounts of  
Company, and  
their Audit.

Penalty.

Railway sta-  
tutes.

every railway company must deposit with the Registrar of Joint-Stock Companies in England a copy certified and signed by the company's registered officer as a true copy of their loan capital half-yearly account. A railway company may also, if they think fit, deposit with the Registrar of Joint-Stock Companies in Scotland, or with the Assistant-Registrar of Joint-Stock Companies in Ireland, or with each, a like copy of any loan capital half-yearly account. If at any time any railway company fail to deposit with the Registrar of Joint-Stock Companies in England within the time required such a copy as aforesaid of any loan capital half-yearly account, they are liable on summary conviction to a penalty not exceeding 20*l.*, and in case of a continuing offence to a further penalty not exceeding 5*l.* for every day during which the same continues.

The accounts required to be furnished by the two statutes of 1866 and 1868 are for the benefit chiefly of the shareholders, although the Board of Trade has, as we have seen, considerable control over them.

It is further provided by the Regulation of Railways Act, 1871 (*c*), that railway companies must annually prepare returns of capital traffic and working expenditure, and forward the same to the Board of Trade within fourteen days after the first ordinary meeting held in each year.

12. Remedies of  
Creditors against  
Shareholders.

12. Remedies of Creditors against Shareholders.

C. Act, &c. &c.

We have already remarked that a railway company are incorporated by the special act. As a corollary from this, they are at common law amenable to such judgments as may be given against them in any suit, in respect of the corporate property (*a*) only, and not as corporators individually. Even at common law, however, individual corporators could after a judgment against their corporation which remained unsatisfied, be made liable to creditors, in respect of corporate property remaining in their hands, by the procedure of *scire facias*. And in analogy to this procedure, in cases where a shareholder has not paid up the full amount of his shares, the Companies (Clauses Act of 1845 enacts, that if any execution be issued against the company, and there cannot be found sufficient whereon to levy such execution, then such execution may (by order of the Court (*b*),

( ) 34 & 35 Vict. c. 75, post. vol. II. And see Chap. IX., 'Jurisdiction of the Board of Trade.'

(a) For the extent of the liability of the corporate property, see Chap. III., sect. 7, post.

(b) The affidavits on which the motion

is made should be intitled in the original action. *Reynolds v. Kilkenny, &c. R. Co.*, 5 C. R., N. S. 786, 787. As to the sufficiency of the affidavits, see *S. C.* and *Hogg v. Harrold Valley R. Co.*, 2 C. B., N. S. 110; *Ridgway v. Security Mutual Assurance Society*, 18 C. B. 686.

to be made after notice given to the shareholder) (c) be issued against any of the shareholders (d) to the extent of their shares not then paid up; and the execution creditor may inspect the register of shareholders, to ascertain the names of the shareholders: (8 & 9 Vict. c. 16, s. 36.) And it is further provided by the Rules of the Supreme Court, 1883, Order XLII., Rule 23, that "where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company . . . the party alleging himself to be entitled may apply to the court or a judge for leave to issue execution accordingly, and such court or judge, may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in an action may be tried, and in either case such court or judge may impose such terms, as to costs or otherwise, as may be just."

The provisions of the Companies Clauses Act as to the power to issue executions against a shareholder being substantially the same as in those statutes, where it was decided to be necessary to issue a scire facias (e), it was held, before the promulgation of this rule, to be the proper course<sup>o</sup> to apply for a scire facias, in cases under sect. 36 (f), although the Court had power to issue an execution in the first instance, without any scire facias (g), and it would allow execution to issue at once, without a scire facias, at the instance of the shareholder (h). In one case, a railway company holding shares in another company which had failed to pay a sum of money as ordered by the Court, was allowed a short time to show cause against the writ of execution, and the scire facias was dispensed with (i). It was settled, however, that the Court was not bound to issue a scire facias under sect. 36, but might exercise a judicial discretion in the

Scire facias,  
Execution without  
scire facias.

Discretion of  
Court.

(e) Where the notice to the shareholder claimed more than the plaintiff was entitled to charge the shareholder with, and he tendered the amount claimed under protest, the rule nisi for a scire facias was discharged with costs. *Scott v. Pritchard and Rickmansworth R. Co.*, 35 L. J., C. P. 293; 1 Han. & Buell, 621.

(d) This means shareholders at the time of the sheriff's return *antra bona*. *Nixon v. Green*, 11 Exch. 550; 27 L. J., Ex. 509. Concurrent writs of scire facias may issue against several shareholders. *Nixon v. Braundine*, 26 L. J., Ex. 12.

(c) See *Cross v. Lister*, 6 M. & W. 217, and other cases cited in *Hitchins v. Kilkenny R. Co.*, infra.

(f) *Hitchins v. Kilkenny R. Co.*, 10 C. B. 100; *S. C.*, 20 L. J., C. P. 31; 1

L. M. & P. 712; *Darwin v. Kilkenny R. Co.*, 5 Exch. 831; *S. C.*, 20 L. J., Ex. 37; 1 L. M. & P. 788; *Kilkenny R. Co. v. Patten*, 20 L. J., Ex. 111. In *Hitchins v. Kilkenny R. Co.*, 15 C. B. 159, the affidavit of due diligence was held sufficient. See also *Nixon v. Green*, 25 L. J., Ex. 219; *Robins v. Derbyshire, &c. Co.*, 9 Exch. 149.

(g) See *Darwin v. Kilkenny R. Co.*, 5 Exch. 831; *Roby v. Dublin Tram Conducting R. Co.*, 36 L. J., C. P. 283.

(h) *Bull v. Dublin Tram Conducting R. Co.*, 37 L. J., Q. B. 50; 1 L. R., 3 Q. B. 17.

(i) *Roby v. Dublin Tram Conducting R. Co.*, 1 L. R. 9 Eq. 118; 39 L. J., Ch. 387.

12. *Principles of  
Creditors—Scire  
facias.*

*Lee v. Bude and  
Torrington R. Co.*

matter (k), cases seemingly to the contrary being merely taken to mean that where the creditor had a just claim the Court could not refuse to enforce it (l). A vague suggestion of fraud, or that Parliament has been imposed upon by false recitals in the special act, would not induce the Court to withhold the writ. This is the result of *Lee v. Bude and Torrington R. Co.* (m), in which Willes, J., in reviewing the authorities, observed:—

“The scire facias is not a writ of right to be obtained as of course; but it is of right whenever the Court is satisfied that there is proper and just ground for allowing it to issue. And I apprehend that, where there is a *prima facie* legal claim which is sought to be enforced without vexation or oppression, and the plaintiff is not in the same position as the person against whom he seeks to have execution, the Court is bound—in the exercise of a judicial discretion, even though there may be circumstances in the case which incline them to look with disfavour on the application—to grant the rule, in order that the matter may be fully discussed. In so doing the Court in no degree prejudges the matter, but leaves it open to any substantial answer either at law or in equity.”

Such being the previous practice, the rule of Court above mentioned appears to alter it, first by the abolition of the action of scire facias as a separate procedure, substituting for it a mere order for trial of an issue, and secondly by extending the discretion of the Court in determining whether execution shall issue at once on motion, or whether the trial of an issue shall first be had. The cases prior to the rule, therefore, will be of diminished value, but as they may still, to some extent, guide the exercise of the discretion of the Court, they are now appended, as follows:—

#### *Cases prior to the Rule of 1883.*

In a case where paid-up shares were allotted to bankers merely as security for an overdrawn account, the Court, though clearly of opinion that the bankers were not liable (n), allowed the writ to go, in order that the question might be tried in error (o).

Id. cit.

A party who had recovered judgment against the company was not precluded from issuing execution against shareholders, though lands of the company had been delivered on elegit, if the proceeds of the lands were insufficient to pay the debt (p). But if a sum certain had been actually received from the rents of the land extended under the elegit, scire facias only issued for the residue of the debt. And

(k) *Morris v. Earl Bathurst*, 26 L. J., C. P. 62; *Hill v. London and County Banking Co.*, 26 L. J., Ex. 80. (l) Per Willes, J., in *S. v. P. by App. and Reductions R. Co.*, *ubi supra*. See also *Sutton v. Southampton R. Co.*, L. R., 3 C. P. 80; *Hill v. Chichester and Malton R. Co.*, *ubi supra*.

(m) L. R., 6 C. P. 576; 40 L. J., C. P. 285.

(n) See *Curry, Ex parte*, 32 L. J., Ch. 57.

(o) *Thurst v. Worcester, &c. R. Co.*, 38 L. J., C. P. 23; L. R., 1 C. P. 9.

(p) *R. v. Derbyshire, &c. R. Co.*, 3 E. & B. 784.

where no sum had been received, and the only means of satisfying the debt arise from the future rents, the Court would probably permit the scire facias to issue, unless the rents were ample and soon to fall due (g). In a case (r) in which a creditor obtained a rule nisi for scire facias for execution against a shareholder, and it appeared that the company was in process of being wound up, and that, though it had no property against which execution could issue, a large sum stood to the credit of the official manager, the Court enlarged the rule until it should be ascertained whether this sum could be made available for satisfaction of the judgment. Subsequently, it appeared that this sum could not be made available till after the final determination of disputes between different classes of contributors, and that there was no prospect of these disputes being determined within any definite time; and it was held, that the existence of funds which might ultimately, under the winding-up acts, be made available for payment of the debt, was no bar to the creditor proceeding under sect. 36, and the Court made the rule absolute. And it was held in a more recent case that the Court had jurisdiction to order the scire facias to issue, although there is property of the company which has not been taken in execution, if such property was not sufficient to satisfy the debt of the judgment creditor (s).

Execution on  
good office of  
company.

It was held no answer to an application to the Court of Common Pleas for a scire facias against a shareholder, that the Court of Queen's Bench had ordered execution to issue without a scire facias against the same shareholder, at the suit of another judgment creditor of the company, and no payment had been made or tendered under such order (t). Where, pending a rule for a scire facias against a shareholder, obtained by one creditor of the company, a second rule, obtained by another creditor against the same shareholder, was made absolute, and under the second rule he paid, before execution issued against him, all that was due upon his shares, it was held that the first rule must be discharged (without costs) (u). And so where, after rule nisi granted, the applicant obtained satisfaction of his judgment by means of rules against other shareholders (v). But although writs might be issued against several shareholders at the same time, the Court refused to issue a further writ against a shareholder who had already satisfied a preceding writ up to the full amount of his shares (y).

Application by  
several creditors  
against same  
shareholder.

(g) *Addison v. Tate*, 11 Exch. 250.

(r) *Mackenzie v. Sligo R. Co.*, 4 F. & B. 119; and see *Palmer v. Justice Insurance Co.*, 26 L. J., Q. B. 73.

(s) *Elfric v. B. Co. v. Lord Pallimore*, L. R., 3 C. P. 288; 37 L. J., C. P. 86.

(t) *Rigby v. Dublin Trunk, &c. R. Co.*,

36 L. J., C. P. 282.

(u) *Ibid.*

(v) *Ibid.*

(y) *Kerrighan v. Dublin Trunk, &c. R. Co.*, L. R., 3 Q. B. 17; 37 L. J., Q. B. 50. See also *Nixon v. Brownlow*, 26 L. J., Ex. 273; 27 L. J., Ex. 509. As to inter-

11. *Remedies of  
Creditors—scire  
facias.*

Director

A director himself, when so appointed by the special act, was held liable on a *scire facias* up to the amount of shares which constitute the director's qualification, although no register of shareholders had been created (2).

ference by a Court of Equity to restrain proceedings against a shareholder upon a judgment collusively obtained against a company, see *Green v. Nixon*, 27 L. J.,

Ch. 819; *Horn v. Kilkenny R. Co.*, 1 Kay & J. 390; 24 L. J., Ch. 241.

(2) *Portal v. Emmens*, L. R., 1 C. P. D. 664, affirming decision below, *ib.* 201.

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## CHAPTER III.

## RAILWAY INVESTMENTS.

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1. *Letters of Allotment and Scrip.*

Letters of Allotment  
and Scrip.

In the early days of railways, previous to the passing of the railway bill through Parliament, the managing or provisional committee usually issued letters of allotment, and subsequently scrip certificates of shares, previously to the passing of a railway bill through Parliament, and whatever doubts were once entertained with respect to the legality of the practice, these scrip certificates soon came to be publicly sold at the Stock Exchange (a), although the Committee of the Stock Exchange did not recognise any dealing in the letters of allotment. In more modern times, however, it has become the practice to defer issuing the letters of allotment till after the passing of the bill.

The purchasers have usually no legal transfer made to them by the vendor, or the parties who issued the scrip, but the transaction is completed by payment of the purchase-money, and the handing over the scrip; and these purchases are very frequently made for the mere chance of selling the scrip at an advanced price; and in many cases such speculations would not be entered into if the purchasers were obliged to incur the expense of stamps, and a proper legal assignment of the scrip.

Executory contracts for the sale of letters of allotment and scrip are legal, and may be enforced (b). Such contracts need not be in

Executory con-  
tracts for the sale  
of scrip are legal.

(a) *London Grand Junction R. Co. v. Freeman*, 2 M. & G. 639; *Jackson v. Cocker*, 2 Railw. Cas. 372; S. C., 4 Beauv. 59.

(b) An action lies for non delivery of railway scrip. *Tempest v. Kilner*, 2 C. B. 309; 3 D. & L. 407. And a broker

may prove in bankruptcy, against his assignee, for losses occasioned by non-completion of a contract for the purchase of such scrip. *Ex parte Barton*, 1 De Gex, 316. S. also *Ex parte Norton*, 11 Jan. 699.

1. *Letters of Allotment and Scrip.*

Rights of holders of letters of allotment and scrip certificates.

Scrip certificates are transferred for certain purposes without writing.

and the holders are registered by the company as shareholders.

writing, as they do not relate to an interest in land, nor to goods within the Statute of Frauds (c); but when reduced into writing they are liable to stamp duties (d).

It has been held that the mere possession of letters of allotment, or scrip certificates of shares, gives a *prima facie* ownership, for certain purposes, to the holders (e). Thus the owner of scrip certificates has been allowed, on his own behalf, and on behalf of other proprietors of scrip certificates, to file a bill in equity, to restrain the directors of a company, which had issued the scrip, from misapplying the funds of the company (f).

The practice being such as we have described, it frequently happens, that in the interval between the issuing of the scrip certificates, and the period when it is called in for the purpose of being registered, the scrip certificates pass from hand to hand on the Stock Exchange, and are the subjects of the ordinary contracts which take place in the share market. After the special act is obtained, many railway companies have been accustomed to register these holders of scrip as shareholders, without inquiring whether they were the original subscribers who had obtained the scrip and signed the preliminary contracts, or not; and thus the registry of the shareholders has been made in numerical order, as the scrip is brought to the company's office, and not with reference to the numbers of the shares allotted, as denoted on the face of the scrip certificates. The legality of this proceeding was questioned in some cases, but it was determined, that parties once registered as shareholders, under such circumstances, are liable to pay the calls on the shares, although they had never signed the preliminary contracts, or obtained any legal transfer of the scrip from the original allottees of the scrip (g). These decisions appear to be applicable to the provisions in the Companies (Clauses) Consolidation Act, with respect to the registration of shares; and it may now perhaps be assumed, that, if the holders of scrip apply to the company, and are registered as shareholders, they thereupon become liable to pay all subsequent calls (h), so long as the shares remain registered in their names.

(c) *Walker v. Bartholt*, 18 U. B. 815.

(d) By the Stamp Act, 1870 (33 & 34 Vict. c. 97) and sched. tit. "Contract Note," the duty is one penny. By sect. 69 of that act, the duty may be denoted by an adhesive stamp. The penalty for making an unstamped note is 20*s*, and no brokerage is recoverable unless the note be stamped.

(e) See *Daly v. Thompson*, 10 M. & W. 309; *Heath v. Nott*, 1 Exch. 856.

(f) *Burrow v. Eastern Canal Co.*, 10 L. J., Ch. 110; 7 Han. 114; 2 Macn. & Goul. 389; and see *Re Madoc and*

*Tudencia R. Co.*, 16 Jur. 809.

(g) *Birmingham and Thames Junction R. Co. v. Locke*, 1 Q. B. 255; *London Grand Junction R. Co. v. Freeman*, 2 Man. & G. 606; 2 Railw. Cas. 468; *Same v. Graham*, 1 Q. B. 271.

(h) *Chatterham and Great Western Union R. Co. v. Daniel*, 2 Q. B. 293; *S. U.*, 2 Railw. Cas. 728; *Sheffield and Manchester R. Co. v. Woodcock*, 7 M. & W. 581; *S. U.*, 2 Railw. Cas. 522. Where an allottee sold scrip in the market, and after the company had obtained their act, and in default of the holder of the scrip coming

In all the cases above mentioned, the company, without offering any objection, registered the scrip, and placed the names of the holders on the register; and under the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16, s. 8, post, App.), such a step, when taken, seems to constitute the party a shareholder. But a question of a different kind is raised, if a company should refuse to register the mere holder of scrip certificates, he not being the original allottee of the scrip. It is obvious, that in some cases it may be of the utmost importance, that a company should be able to compel the parties, who signed the preliminary contracts, to come in and register themselves as shareholders; and accordingly the authorities show that the company are not without a remedy in such a case (*i*). It seems that after the special act is obtained, the company may, without the consent of, and even without communication with the original allottees insert their names in the registry of shares (*k*). Being thus constituted shareholders, the allottees are made liable to pay all calls, although they may have sold the scrip, *bonâ fide*, in the market (*l*).

But the company may refuse to register such holders, and place the names of the original allottees on the registry.

Original allottees may be registered by the company.

But where the subscription contract has not been signed, and the liability, if any, arises upon scrip issued after the passing of the act, the case is different. Thus the holder of "provisional scrip certificates to bearer" is under no obligation to register, and upon disposing of his certificates in the market is entitled to have his name taken off the register of shareholders, in event of the company having put it on (*m*). And where the plaintiff, upon a prospectus stating that upon registration, "of which due notice would be given," the scrip would be divided into shares, applied for and paid a deposit on the scrip, but received no notice of registration, it was held by Lord Hatherley, C., that he was entitled to have his name removed from the register of shareholders (*n*).

It is settled by *Household Insurance Co. v. Grant* (*o*), that although there must be notice to the allottee in order to bind him to

Contract complete by posting of letter; *Household Fire Insurance Co. v. Grant*.

in to be registered, caused himself to be registered as the owner of the shares and paid the calls, and subsequently sold the shares in the market, Sir J. Wigram, V.-C., held, that he was a trustee for the purchaser of the scrip, and was bound to account to him for the proceeds of the sale of the shares. *Bickitt v. Billborough*, 19 L. J., Ch. 522; 14 Jur. 238; 8 Hare, 188.

(*i*) The older authorities as to the mode of proceeding to recover calls against an original subscriber, who has never been registered, are *Kidwelly Canal Co. v. Kirby*, 2 Price, 93; *Great North of England R. Co. v. Biddolph*, 7 M. & W. 243; *S. C.*, 2 Bailw. Cas. 433; *West London R. Co. v. Bernard*, 13 L. J., Q. B. 68;

*Thames Tunnel R. Co. v. Sheldon*, 6 B. & C. 341; 4 D. & R. 278.

(*k*) *Buske v. Lechmere*, 1 L. R., 6 Q. B. 297; 40 L. J., Q. B. 99.

(*l*) *Midland Great Western R. Co. v. Gordon*, 16 M. & W. 604; 5 Bailw. Cas. 76; 16 L. J., Ex. 166; *Nixon v. Brownlow*, 23 L. J., Ex. 272; 27 L. J., Ex. 509.

(*m*) *Easton v. Dublin Trunk Contracting R. Co.*, L. R., 6 Eq. 182; 15 L. T. 679; approved by Lord Hatherley, C., in *M'Herrath v. Same Co.*, *ubi infra*.

(*n*) *M'Herrath v. Dublin Trunk, &c. Co.*, L. R., 7 Ch. 134; 11 L. J., Ch. 262; affirming Lord Romilly, M. R. Probably the plaintiff would have been liable as a contributory in this case.

(*o*) L. R., 4 Ex. D. 216; 48 L. J., Ex.



1. Letters of Allotment and Receipt.

A change in the scheme originally proposed will not release an original allottee from the liability to be registered.

If the scheme be altered after allotment, or if the allottee is not bound for a portion of the expenses incurred.

take shares (p), yet a letter of allotment is sufficient notice if posted, whether it actually reach the allottee or not.

If a subscriber for shares executes the subscribers' contract, giving, (as is usual) extensive powers to the managing committee, he is bound by the provisions of the act which is ultimately obtained, even if it should authorize a scheme very different from that which was originally contemplated. Thus, where the subscribers' contract was for forming a company to make a railway from Dublin to Mullingar, and thence to Athlone, and authorized the directors to do all the transactions necessary for forming a railway from Dublin to Mullingar and Athlone, and bound the subscribers to submit to such regulations as might be imposed by the legislature; and the act afterwards obtained empowered the company to buy and work a canal from Mullingar to Athlone, and to make a railway from Dublin to Mullingar only, it was ruled that the undertaking sanctioned by the act was not so different from that pointed out in the subscribers' contract as to relieve the subscribers from being bound by it (q). These decisions are the more important because, as we shall see hereafter, if the name of a party is once properly placed on the register, the Companies Clauses Act imposes on him the duty of paying calls, just as if he had expressly agreed to pay them; and it seems to be no defence to an action to recover the calls, to say that the transaction was originally tainted with such illegality as would have afforded an answer to an action brought on an executory contract (r).

When a managing committee fail altogether in their application for parliamentary powers, it may become necessary to ascertain what remedies are available against the parties who have executed the subscribers' contract, to meet the necessary expenses incurred by the committee, in the prosecution of the scheme. In cases of this description, the subscribers' contract must be referred to, to ascertain the rights of the parties, and proceedings may be instituted to carry the provisions contained therein into effect (s). And in cases where the party applying for shares has failed to execute the subscribers' contract, or to pay the deposit, it depends upon the terms of the contract, as they are to be collected from the prospectus, taken in connection with the written application made for shares and the letters of allotment, whether the managing committee can recover damages for non-

219—*At v. Overmilling British and American Telegraph Co. v. Tolson*, 1 L. R., 61 L. 108.

(p) *Irish v. O'Connell*, 1 L. R., 3 Ch. 10.

(q) *Melland Great Western R. Co. v. Gordon*, 16 M. & W. 501; 5 Rulw. Cas. 70; 16 L. J., Ex. 166; *Conf and Fonghal R. Co. v. Paterson*, 15 C. B. 111; *Dean*

*v. Broun*, 26 L. J., Ex. 272; 27 L. J., 1 L. 509.

(r) *West Cornwall R. Co. v. Morant*, 15 Q. B. 521; 19 L. J., Q. B. 479, per Lord Campbell, C. J.

(s) *Wells v. Stiller*, in error, 10 C. B. 477; *Millett v. Brown*, 2 H. & N. 837; *Essex v. Mowatt*, 1 Drew. 247.

payment of the deposits (*f*). To support such an action it is necessary that the managing committee should have acted with good faith; for it would be an answer, if it appeared that the contract to pay the subscription was obtained by means of false or wilful misrepresentations or misstatements, as to the affairs of the projected undertaking (*g*).

But the managing committee must act with good faith or they cannot recover preliminary expenses.

Where the defendant by letter requested the committee of a company to allot him a certain number of shares in the undertaking, and thereby undertook to receive the same or any less number, and to pay the deposit and execute the parliamentary contract and agreement when required, and in answer to this application he received a letter from the company allotting him certain shares, but this letter was headed "not transferable;" it was held that this term qualified the acceptance, and that the two letters together did not constitute any contract. The ground of this decision was, that the proposal on the part of the defendant was for an absolute and unqualified allotment of shares; and the proposal and acceptance not being ad idem, it followed that there was no binding contract between the parties (*h*).

## 2. The Registry of Shares.

## 2. Registry of Shares.

The special act prescribes the amount of the capital of the company, and the register of shareholders may be formed either as soon as the act has received the royal assent, or within an indefinite time afterwards (*j*). We have seen that it is the practice to register the names of the holders of the scrip certificates, but that the company have the option, if they elect to exercise it, of placing the names of the original allottees of the shares on the registry.

By the Companies Clauses Consolidation Act, 1845, the capital of the company is directed to be divided into shares, of the prescribed number and amount, and numbered in arithmetical progression: (Sect. 6 (*c*)). Such shares are declared to be personal estate, and transmissible as such: (Sect. 7.) They are not within the Mortmain Act (*a*), nor goods within the Factors' Act (*b*); but they are "things in action" so as to be excepted by s. 44, par. iii. of the Bankruptcy

Shares are personal estate, &c.

(*f*) *Hulton v. Thompson*, 3 H. L. C. 187; *Ashpitt v. Sercombe*, 5 Exch. 117; 10 L. J., Ex. 52; *Ex parte Copper*, 1 Sim., N. S. 178; 20 P. J., Ch. 118; *Jones v. Harrison*, 2 Exch. 52; *Jolly v. Rooney*, 11 Ir. L. R. 487.

(*g*) *Wentner v. Shairp*, 4 C. B. 401. And in cases of this kind the allottees may recover back their deposits. See this subject discussed, Chap. XVIII. post.

(*h*) *Duke v. Andrews*, 3 Exch. 200; see also *Chaplin v. Clarke*, 4 Exch. 403;

*Mowatt v. Lord Londesborough*, 3 Ell. & Bl. 307, 325; *Huntmer v. Tobin*, 10 Q. J. 591.

(*i*) *Burke v. Lechnur*, L. R., 6 Q. B. 207.

(*c*) Whether the amount of each share may be varied, see *Ambergath R. Co. v. Mitchell*, 8 Bailw. Cas. 228.

(*a*) *Ashton v. Lord Langdale*, 20 L. J. Ch. 231.

(*b*) *Frezman v. Applihard*, 32 L. J., Ex. 175.

2. Registry of  
Shares.

Act, from the rule of reputed ownership expressed by that enactment, whereby goods of other persons of which a bankrupt is a reputed owner pass to his trustees in bankruptcy (c). Every person who has subscribed the prescribed sum or upwards to the capital of the company, or who has otherwise become entitled to a share in the company, and whose name is on the register of shareholders, is to be deemed a shareholder: (Sect. 8.) The signature of the subscription contract is of itself and without either allotment, notice of allotment, or payment of money by the subscriber, an authority to place the subscriber on the register at any time afterwards (d).

Mode of keeping  
register, sect. 9.

A book, to be called the Register of Shareholders, is to be kept by the company, and the names of all shareholders must be entered therein, together with the number of shares to which they are respectively entitled, distinguishing each share by its number (e); and the register must be from time to time authenticated by the common seal of the company: (Sect. 9.) It has been held by a Court of Appeal, that the 9th section is directory only as to the time of making up the register (f); and it may be said generally that the provisions of the act, as to the mode of keeping the register, are directory and not imperative (g), inasmuch as no negative or prohibitory words are employed. When the register consists of several volumes, following each other alphabetically and consecutively, it is sufficient if the seal of the company be attached to the last volume (h), and it is not necessary to prove that the seal was affixed to the register at an ordinary meeting of the company, as directed by the above section (i). But where a sealed register described the holders of shares as "Brownrigg and others, trustees," and the company sued Brownrigg and one Taylor, who was his co-trustee, for calls, it was held that the register

Statute directory  
only.

(c) *Columbia Bank v. Whelan*, L. R., 11 App. Cas. 426; 36 L. J., Ch. 43.

(d) *Butke v. Lockman*, L. R., 6 Q. B. 297; 40 L. J., Q. B. 98; 19 W. R. 365.

(e) In *East Gloucestershire R. Co. v. Bartholomew*, 37 L. J., Ex. 17; L. R., 3 Ex. 15; 17 L. T. 256, it was held, distinguishing *Irish Rail Co. v. Phyllis*, 50 L. J., Q. B. 114, 363, that sects. 6, 8 and 9 (as to mobbing shares) were substantially satisfied by a shareholder's name being entered in the register without the distinguishing number of his shares, it being shown by other evidence that the shares held by him were actually distinguished by particular numbers. As to what is a proper mode of keeping the register, see *Bain v. Whithorn and Perth R. Co.*, 3 H. L. C. 1; *London Grand Junction R. Co. v. Farnor*, 2 Man. & G. 606; 8 C. 2 Railw. Cas. 165; *Southampton Dock Co. v. Richards*, 1 Man. & G. 448; *Birmingham, Bristol and Thames*

*Junction R. Co. v. Lowe*, 1 Q. B. 250; *London Grand Junction R. Co. v. Graham*, ib. 271; *Miles v. Bough*, 3 Q. B. 815; *Aylesbury R. Co. v. Thompson*, 2 Railw. Cas. 668; *West London R. Co. v. Bernard*, 3 Q. B. 873.

(f) *Wolverhampton Waterworks Co. v. Harewood*, 31 L. J., C. P. 184; 11 C. B. N. S. 546, affirming 29 L. J., C. P. 121.

(g) See *East Gloucestershire R. Co. v. Bartholomew*, *ubi supra*.

(h) *Ingles v. Great Northern R. Co.*, 18 Jur. 895. A mandamus does not lie to remove the seal, although improperly affixed. *Essex & North Essex R. Co. v. Nash*, 15 Q. B. 92; 19 L. J., Q. B. 296.

(i) *South Western R. Co. v. McMichael*, 5 Exch. 855; 20 L. J., Ex. 6; 14 Jur. 987. And in a criminal case the mere production of the register is sufficient evidence that a party named therein is a shareholder. *R. v. Nash*, 16 Jur. 533; 21 L. J., M. C. 147.

was not even *prima facie* evidence that Taylor was a shareholder, although his name appeared in the alphabetical list of shareholders, which referred to the sealed register (*k*). A defendant may, however, show that he was unlawfully placed upon the register (*l*); or, under a plea denying that he is a shareholder, he may prove that he is not a shareholder *de jure*, so as to be entitled to take the dividends due on the shares (*m*).

The true construction of the sections of the Companies Clauses Act, 1845, which deal with the register of shareholders, was much considered by the Common Pleas Division of the High Court in *Portul v. Emmens* (*n*), in which it was held, that a person who by the special act was named one of the first directors of a railway company, and required as such director to hold a certain number of shares, was liable on "scire facias" (see p. 81, *ante*) in respect of such shares, although no register was in existence and no allotment of shares had been made. In a considered judgment the Court observed:—

Construction of sections as to register.

*Portul v. Emmens*

"The true view of the act we take to be as follows:—1. If a proper register is kept, that register is *prima facie* evidence that a person whose name is on it is a shareholder (see sect. 28). 2. If in addition it be proved that such person has become, by subscribing the prescribed sum or otherwise, entitled to a share in the company, the evidence that he is a shareholder is conclusive. 3. If there be no such register, or if the register be so defective as to be inadmissible in evidence, other evidence must be adduced to prove that a person is a shareholder. But to exclude all such evidence is not in our opinion required by the act, and would lead to consequences which are really absurd; for if this doctrine were to prevail, it would always be in the power of the directors to avoid keeping a register, and thus deprive the creditors of the company of all remedy against the shareholders, or to avoid registering their own shares, and thus secure to themselves perfect immunity from actions for calls as well as from proceedings by *scire facias*. Nor is it in our opinion a sufficient answer to this objection to say that they might be compelled by mandamus to register their shares. The question is, what is the true construction of the statute; and we are of opinion that a construction leading to such results as those above pointed out is to be avoided, unless the language of the statute is so clear that there is no escape from it; and this is by no means the case."

After referring to and distinguishing *Burke v. Lechmere* and other cases, the Court proceeded to distinguish *Wolverhampton Waterworks Co. v. Harksford* (*o*) upon the language of the special act and also remarked:—

(*k*) *Birkenhead R. Co. v. Broravigg*, 4 Exch. 426; 19 L. J., Ex. 27; 6 Railw. Cas. 47.

(*l*) See *Guaranteed Iron Co. v. Westoby*, 21 L. J., Ex. 302; 8 Ex. 17.

(*m*) *Shropshire Union R. Co. v. Anderson*, 18 L. J., Ex. 232; 3 Exch. 401; 6 Railw. Cas. 56. See also *Waterford R.*

*Co. v. Logan*, 19 L. J., Q. B. 259; *Ilfrcombe R. Co. v. Nash*, 21 L. T. 209; 18 V. R. 431.

(*n*) L. R., 1 C. P. D. 201; 34 L. T. 318; affirmed by Court of Appeal, L. R., 1 C. P. D. 684; 46 L. J., C. P. 179; 35 L. T. 882; 25 W. R. 235.

(*o*) 31 L. J., C. P. 184.

2. *Responsibility of*  
*shareholders.*  
 — — — — —  
 Liability of first-named directors.  
*Porter v. Lunn* 1891

"Further it is to be observed that the language of sects. 26 and 27 of the Companies Clauses Consolidation Act, 1845, on which *Hawkeford's case* turned, is not the same as the language of sect. 36, with which we have here to deal: and the Court, in deciding that case, rested its judgment on the language of the sections relating to the payment of subscriptions and the means of enforcing the payment of calls. It is true that the words 'extent of their shares' and 'respective shares' occur in this section; but we do not see that the same conditions are necessarily imported into a proceeding under this section as were held in *Hawkeford's case* to be imposed in the sections relating to actions for calls under sect. 26 et seq.

"It may well be that, for all purposes of internal management and regulation, e.g., attendance at meetings, voting, whether in person or by proxy, making and paying calls, forfeiture of shares and the like, registration, or the allotment of shares numbered and identified, may be necessary to constitute a person a shareholder, but it does not at all follow that because there is no register there can be no shareholders for the purpose of paying debts which the company through their own instrumentality may have contracted. Be this, however, as it may, we have to construe two acts of Parliament upon a point not as yet covered by authority; and it appears to us that to extend the decision in *Hawkeford's case* to the case now before us would be contrary to the construction of those acts."

Non-liability of  
 first named  
 directors after  
 resignation.

But where directors named in the special act resigned, and after their resignations their places were filled up, and the whole number of shares was filled up also, the Court of Appeal held that they were not liable *on scire facias* in respect of a debt contracted after the resignations (*p*), and the law appears to be that a bona fide resignation operates as a surrender of the inchoate right to shares, and to divest the resigning director of the liability attaching to him in respect of them (*q*).

Charge on shares.

Where shares remain in the name of a party on the register, they may be charged with a judgment debt due from him, under 1 & 2 Vict. c. 110, s. 14, and Rules of the Supreme Court, 1883, Order XLVI, rule 1, which authorize a Divisional Court or a judge to charge the shares of a judgment debtor "standing in his name in his own right, or in the name of any person in trust for him;" the charge, however, will be subject to the rights of prior incumbrancers (*r*).

Shares of bankrupt.

The right to transfer the shares of a bankrupt may be exercised by the trustee of the bankrupt to the same extent as the bankrupt might have exercised the same if he had not become bankrupt (*s*); and it may be here mentioned that one of the grounds for the refusal of an order of discharge to a bankrupt, is that "he has brought on his bankruptcy by rash and hazardous speculations" (*t*).

(*p*) *Kilgus v. The L. R. & C. P. R.*  
 350; 17 L. J., C. P. 617; 59 L. T. 188;  
 27 W. R. 81—C. A.  
 (*q*) *Mann v. Lunn*, 51 L. T. 165.  
 (*r*) *Went v. Price*, 3 L. & B. 713;  
*Bowen v. Lord Oxford*, 25 L. J., Ch. 299;

6 D. G. M. & C. 517.  
 (*s*) Bankruptcy Act, 1883 (46 & 47 Vict.  
 c. 52), s. 50, subs. 3. As to disclaimer of  
 unmarketable shares, see s. 55.  
 (*t*) Ib. s. 28, subs. 3 (*g*).

A shareholders' address-book, containing an alphabetical list of all shareholders, with their places of abode and descriptions, must also be kept by the company, open to the perusal of every shareholder: (8 & 9 Vict. c. 16, s. 10.) And the company are bound under a penalty of 20*l.* to print correct copies of the shareholders' address-book, and supply such printed copies at a price not exceeding 5*s.* for each copy, to all holders of ordinary, preference, or debenture stock (*v.*).

Shareholders' address-book.

The holder of any share may demand of the company a certificate of the proprietorship of such share, under their seal. The certificate may be according to a form annexed to the act (sect. 11); and it is *prima facie* evidence of title, though the want of it does not prevent the holder from disposing of his share: (Sect. 12.) A lost or damaged certificate may be replaced: (Sect. 13.)

Certificate of shares.

The company, if authorized by three-fifths of the votes of the shareholders, may convert the shares paid up into a general capital stock: (Sect. 61.) After such consolidation, the provisions of the act, which require the capital to be divided into shares, cease, and the holders of stock may transfer it in the same manner as shares: (Sect. 62.) The names of the holders of stock must be entered in a book, called "The Register of Holders of Consolidated Stock," which is to be accessible to holders of shares or stock (*v.*): (Sect. 63.) The holders of stock are entitled to dividends, and the same privileges as would be conferred by shares of equal amount: (Sect. 64.)

Conversion of shares into stock.

### 3. Calls on Shareholders.

With respect to the payment of subscriptions, and the means of enforcing the payment of calls, it is enacted by the Companies' Clauses Consolidation Act, 1845, that persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively subscribed, or such portion thereof as shall from time to time be called for by the company; and with respect to the provisions in that act or the special act contained for enforcing the payment of calls, the word "shareholder" (*y*) shall extend to the legal personal representatives of such shareholder: (Sect. 21.) The company may from time to time make calls (*z*)

3. Call on Shareholders.

Liability to pay calls.  
C. C. Act, sect. 21.

Notice of call.

(u) 31 & 32 Vict. c. 119, s. 34, post, vol. II.

(w) And a party, whose claim to be a shareholder is disputed by the company, may, in an action brought against the company, inspect any entries in the register which relate to the matter in dispute. *Forster v. Governor of the Bank of England*, 8 Q. B. 689.

(y) By the interpretation clause, sect. 3,

"shareholder" means shareholder, proprietor or member of the company; and, in referring to any such shareholders, expressions properly applicable to a person, apply to a corporation. See *Re Barnard's Banking Co.*, 36 L. J., Ch. 732, 37 L. J., Ch. 81.

(z) Circumstances may arise in the proceedings of a company, which would authorize the Queen's Bench Division to issue a

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Action for call.

Vesting of shares.

upon shareholders, provided that 21 days' notice, at least, be given of each call, and that the calls be made as prescribed; and every shareholder is liable to pay the amount of the calls so made by the company: (Sect. 22.) If calls are not paid on the day appointed, interest on the amount of the call is payable to the company: (Sect. 23.) The company may agree to pay interest to a shareholder who pays money in advance of calls: (Sect. 24.) If a shareholder fails to pay a call on the day appointed, the company may sue him for the amount, with interest: (Sect. 25) (*a*). Where companies are amalgamated, calls made by the dissolved companies previous to amalgamation are payable to and may be enforced by the amalgamated company (*b*).

It has been decided that the company cannot maintain an action to recover calls against any person but a shareholder (*c*), nor against a shareholder, unless the call was made strictly according to the directions contained in the statute (*d*).

But where the special act provided (as is usual) that the company should not issue any shares created under the authority of the act, nor should any share vest in the person accepting the same until one-fifth of the amount of the share was paid up; it was held that this provision was intended for the protection of the public, to prevent the issue and vesting of shares, so as to enable them to be bought and sold in the market, and that the payment of one-fifth of the amount due on a share was not a condition precedent to the liability of the holder for calls (*e*).

mandamus to compel the company to make calls on shareholders. See *R. v. Victoria Park Co.*, 1 Q. B. 292. But as the creditors of a company may recover judgment debts from shareholders who have not paid up the full amount of their shares, the remedy by mandamus will not in such cases be likely to be resorted to. See Chap. II., Sect. 12, ante.

(*a*) As to forfeiture of shares, see Sect. 5 of this Chapter, post.

(*b*) 26 & 27 Vict. c. 92, s. 52 post, vol. II.

(*c*) *Walsingham New Waterworks Co. v. Hantsford*, 28 L. J. C. P. 212, 6 C. B. N. S. 336. Therefore it is not sufficient that the defendant was merely a subscriber to the undertaking. In such a case, he must be sued on the subscription contract by the persons with whom it was entered into.

(*d*) The proper mode of giving notices to shareholders may be seen by referring to 8 & 9 Vict. c. 16, ss. 136 to 139, post, vol. II. In an action for calls, to show notice thereof to the defendant, the plaintiff proved that it was the course of business

for C., a deceased clerk, to fill up printed notices of the calls and direct them to the shareholders, and then to put them into a basket for another clerk to post, which he had done on the occasion of this call. A list of shareholders, containing the name of the defendant, was produced in C.'s handwriting, and indorsed by him, "Letters sent out." C. had received instructions to make out such a list, and had been filling up and directing the notices with such a list before him: it was decided that the list so indorsed was evidence that notice of the call had been sent to the defendant. *Eastern Union R. Co. v. Spaulds*, 6 Railw. Cas. 578; 19 L. J., Ex. 287; 5 Exch. 237.

(*e*) *East Gloucestershire R. Co. v. Bartholomew*, 37 L. J., Ex. 17; L. R., 3 Ex. 15; *McKen v. West London Wharves, &c. Co.*, L. R., 6 Ch. 655, reversing *Stuart v. C.*, ib. p. 658, n; *Purdon's case*, 16 W. R. 660. In the second of these cases, the first was followed as an authority; in the third, Romilly, M. R., agreed with its principle.

It may be remarked that making the call, and the notice of it spoken of in sect. 22, are two distinct things; for the call must be made before the notice of its having been made can be given; and it has been decided that the call means the resolution of the board that a call shall be made (*f*). So it has been ruled that the directors, and not the company, are the proper parties to make the call (*g*).

The resolution need not specify the time or place for paying the call (*h*); it is sufficient if the directors appoint a time and place, which is notified to the shareholder by the notice, allowing him 21 days (*i*) for the purpose of payment. This was decided in *Newry and Enniskillen R. Co. v. Edmunds* (*j*). In that case an action having been brought to recover calls, one of the questions was whether the calls were duly made in pursuance of sect. 22. It appeared that a meeting of the directors had been held, at which it was resolved, that a second call be made, and "that one month's notice be given;" but the resolution contained no time or place for payment. The following notice was afterwards sent to the defendant, signed by the secretary of the company: "Sir,—The directors having made a call of 2*l*. 10*s*. per share, payable on or before the 8th of August next, you are requested to pay the sum of 12*5l*., being the amount payable, in respect of such call, of the shares held by you in this company, to any of the under-mentioned bankers." It was objected on behalf of the defendant that the call was illegal, inasmuch as the resolution did not state the time and place of payment, and that the 21st section of the statute clearly showed that a time and place for payment should be appointed; but upon an application being made for a new trial, Parke, B., said:—

"It is clear that the word 'call' is used in the act in two different senses. In one part it means, the application to the shareholders to pay; and in another, the amount to be paid. The sections which empower the company to make calls, contain no express direction that the same application shall be made to each individual for the same portion of the sum originally subscribed. Probably the directors may be under an obligation to do so; but I am certainly of opinion that it is not a condition precedent to their right to recover the amount of the call. If it were so held, the affairs of these companies would be in the greatest confusion; for suppose a notice by accident mislaid, the consequence would be, that the shareholder for whom it was intended would not be bound to pay his call; and those who had

Resolution to make call need not state time and place of payment.

*Newry and Enniskillen R. Co. v. Edmunds*.

Meaning of "call."  
*Newry and Enniskillen R. Co. v. Edmunds*.

(*f*) *Ex parte Tooke*, 6 Railw. Cas. 1: 18 L. J., Q. B. 313; *R. v. Londonderry and Coleraine R. Co.*, 13 Q. B. 998. As to the effect of void calls not withdrawn upon subsequent good ones, see *Willand R. Co. v. Barrie*, 30 L. J., Ex. 163.

(*g*) *Aubergate R. Co. v. Mitchell*, 6 Railw. Cas. 235; 1 Exch. 510.

(*h*) *Great North of England R. Co. v. Biddulph*, 7 M. & W. 218.

(*i*) This means twenty-one clear days, i.e. exclusive of the first and last days. *Re Jennings*, 1 Ir. Ch. Rep. 236.

(*j*) 2 Exch. 122; 17 L. J., Ex. 102. See also *Shiffeld, Ashton and Manchester R. Co. v. Woodcock*, 7 M. & W. 571; 2 Railw. Cas. 522; *London and Brighton R. Co. v. Furzeburgh*, 2 Man. & G. 671; 2 Railw. Cas. 511; *Sturckleford v. Owen*, 37 L. J., C. P. 151.



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already paid on individual notices, and who might be supposed to have paid on the faith that the call was made on each equally, would have a right to claim from the directors the money they had paid, on the ground that it was paid under a mistake of the facts. That construction would be fraught with such evil consequences, that I think it impossible (putting a reasonable interpretation on the act of Parliament) to say that the Legislature intended that what they have not expressly declared, but which is only implied, should amount to a condition precedent. I am, therefore, of opinion, that it is not a condition precedent that each party should have notice to pay the amount of his call at the same time and place. It follows that the resolution to make a call need not specify either the time or place for payment; but the directors must appoint a time and place, which must be notified to the shareholder by a notice allowing him twenty-one days for the purpose of payment. The case of *Great North of England R. Co. v. Biddulph* (k), proves that the resolution need not contain the *place* of payment; and I think that, by implication, it also proves that it need not contain the *time* of payment. The resolution is nothing more than a determination that thereafter 'a call' shall be made; that is, that an application shall be made to each shareholder for a proportion of his share; and it is enough if the directors appoint a time or place, either by public advertisement (where such a mode is allowed by the private act), as in the case referred to, or, under the general act, by an individual notice to each shareholder."

Notice of call.

There are some cases where a defendant cannot take the objection that a notice requiring him to pay call has not been proved. Thus, if a party expressly promises to pay a demand for calls, the jury may infer that a proper legal notice was given, unless the plaintiffs affirmatively show, as part of their case, that an informal notice was in fact sent to the defendant. The rule seems to be, that when the Court does not know the facts, an express promise may enable them to infer that what is right has been done; but when the facts are known, and they are insufficient, then the promise does not make them sufficient (l).

It will be necessary to prove that the calls were made at the periods (if any) authorized by the statute; and it seems that a director, who was a party to the making of an illegal call, is not estopped from setting up the illegality of the call, as a defence to an action for calls brought against him (m).

And it has been said, that even if a statute contains no express direction that a notice of call, being made shall be given, still a party cannot be sued for nonpayment of a call till he has received notice thereof (n). The rule is, that when an action is given only, if the party shall neglect or refuse to pay, reason and justice require that the party should have notice (o).

(k) 7 M. & W. 212.

(l) *Miles v. Beugh*, 3 Q. B. 845.

(m) *Sturford R. Co. v. Stratton*, 2 B. & Ad. 518.

(n) *Pearce v. Liverpool Oil & Gas Co.*,

3 Ad. & E. 131; *Brook v. Jemmy*, 2 Q. B. 271; *Edinburgh and Leith R. Co. v. Hobbiewhite*, 4 M. & W. 716.

(o) *Miles v. Beugh*, 3 Q. B. 845.

Where a special act provided that three months, at least, should intervene between successive calls, and the directors, on the 11th January, resolved that a call should be made, to be payable on the 15th February; and on the 8th May, they made another call, to be payable on the 19th June; it was ruled that the calls were properly made (p).

Calls may be made payable by instalments (q). But no action can be maintained until the last instalment is due, and no forfeiture is incurred until non-payment of the last instalment (r).

It is not illegal for a railway company to assign as a security for a debt calls which, though made, have not become payable (s).

Interest on calls is recoverable on the claim for calls (see sect. 27), and it is not necessary to claim interest (t).

The statute further enacts, "that in any action or suit to be brought by the company against any shareholder to recover any money due for any call (u), it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company, (stating the number of shares,) and is indebted to the company in the sum of money to which the calls in arrear shall amount, in respect of one call or more upon one share or more, (stating the number and amount of each of such calls,) whereby an action hath accrued to the company by virtue of that and the special act." (8 & 9 Vict. c. 16, s. 26.)

It is conceived that the statement of claim ought now to be as prescribed under the Rules of Court, 1883, Order XIX., notwithstanding that the above section is not repealed; but the new form will vary very little from the old one.

"On the trial of an action for calls, it is sufficient to prove that the defendant, at the time of making the calls, was holder of one share or more, that the call was in fact made, and the statutory notice was given; and it is not necessary to prove the appointment of the

(p) *Ambergate R. Co. v. Mitchell*, 6 Railw. Cas. 236; 4 Exch. 510.

(q) *Ambergate R. Co. v. Noreliffe*, 20 L. J., Ex. 231; 6 Railw. Cas. 500; 6 Exch. 629.

(r) *L. and N. W. R. Co. v. McMichael*, 6 Exch. 273; 6 Railw. Cas. 197; 20 L. J., Ex. 231.

(s) *Pickering v. Hyscomb R. Co.*, 1 L. R., 3 C. P. 235; 37 L. J., C. P. 118.

(t) See *Southampton Dock Co. v. Richards*, 1 M. & G. 148; *London and Brighton R. Co. v. Fairclough*, 2 M. & G. 671.

(u) Where an action was brought in England by an Irish railway company to recover calls, the plaintiffs were required

to give security for costs, upon the ground that it resembled the case of a plaintiff who resided in Ireland. *Kilbany R. Co. v. Piddie*, 20 L. J., Ex. 111; 6 Exch. 51. As to service of writs (before the Judicature Act) upon Scotch and Irish railway companies, see *Wilson v. Athdown R. Co.*, 5 Exch. 822; 20 L. J., Ex. 7; *Evans v. Dublin and Droghda R. Co.*, 2 D. & L. 865; *Macdonald v. Glasgow and South Western R. Co.*, 1 L. R., 8 Exch. 149. By 18 S. C. 1983, Ord. XI. r. 1, service out of the jurisdiction is in the discretion of the Court or a judge, and by the same rule express provision is made for service in Scotland and Ireland.

3. *Call on Shareholder.*

directors who made the call, 'not any other matter whatsoever : ' ' (Sect. 27.)

The production of the register of shareholders is *prima facie* evidence of the defendant being a shareholder : (Sect. 28.)

Entry of name on register not conclusive evidence of liability.

But although the name of a party be found on the register, he is entitled to show that his name has been illegally placed there, without his authority ; and a purchaser of shares, or even an original subscriber, cannot be sued for calls, until his name is placed on the register (c).

So where the register was produced, and the defendant's name appeared there as the proprietor of fifty shares, but the evidence was that the defendant had applied for shares before the special act was obtained, and had paid the deposit thereon, but had never executed the subscribers' agreement or parliamentary contract, the Court of Exchequer held that the company were not justified, under such circumstances, in placing the defendant's name on the register, and that he was not therefore liable to be sued for calls (y). The Court decided this case on the ground that the defendant was not a person who had subscribed the pre-scribed sum to the capital of the company, or who had otherwise become entitled to a share in the company, within the meaning of the 8th section of the Consolidation Act (z).

If shares are sold and transferred after a call has been actually made, but before any notice of it has been given to the vendor, the latter is liable to pay the call to the company ; but that does not affect the right of the vendor to recover the amount of the call against the vendee, under the contract of transfer (v). And although the registered owner of shares be a mere trustee, he is, in the absence of a special contract to the contrary, alone liable to the company for the calls on such shares, and the company have no remedy against the real or beneficial owner of such shares (h).

Defences in action to recover calls.

Let us now consider the defences which may be set up in an action to recover calls. The defendant may not only dispute that he is a shareholder *de jure*, but may also show that he is not a shareholder *de jure*, so as to be entitled to share in the profits of the undertaking (c).

(y) *North London Ry. Co. v. Parnell*, 2 L. J. 118. 'The right of the company to register the names of shareholders of stock without their consent is a legal right, not a mere privilege.'

(z) *Went v. Wood*, 22 L. J. 116; 1 Ex. 279. But if the defendant had executed the subscribers' agreement and parliamentary contract, he would have been liable to pay the calls.

(c) S. & S. Vict. c. 16, s. 2, and 2

(w) *F. v. F. v. F.*, 6 Railw. Cas. 1; *North London Ry. Co. v. Parnell*, 15 Jur. Q. B. 197; 19 L. J. Q. B. 127; and see further on this point, Rule No. 93 of the London Stock Exchange.

(h) *North London Ry. Co. v. Moss*, 15 Jur. 173; 20 L. J. Ch. 633; 14 Beav. 61.

(c) Cases which turned on points of pleading before the Judicature Act are:—*Buckingham Ry. Co. v. Brown*, 1 Ex. 126; *Went v. Wood*, 22 L. J. 116; 1 Ex. 279.

It is also a good defence that the call was not made by persons having authority to make it (*l*). And where the *special act* provided that the whole of the capital should be subscribed before the powers of the act should be put in force and the company made a call before the subscriptions were completed, and commenced an action to recover it, after the whole capital was subscribed; it was decided that the completion of the subscription list was necessary to enable the company to make the call, and that the action was not maintainable (*o*). But the 16th section of the Companies (Clauses) Act (*p*), which requires the whole capital of the company to be subscribed before the compulsory powers can be exercised, does not prevent the company from making calls before the whole of the capital is subscribed (*q*). Nor is it a good defence that the company had abandoned a part of the railway before the call was made (*h*); or that the call was not made within 6 years (*i*), as the action for calls being founded on a statute, there is the same period of limitation as on a record or specialty, viz., 20 years.

How far fraud is a defence, it is not quite easy to say. A defendant has been allowed to plead that the calls were fraudulently made, but not that he was induced to subscribe, by fraud of the company or its promoters (*j*). It was seen from *Oakes v. Turquand* (*k*), that a call could not be enforced in a case where the shareholder has been induced to take the shares by the fraud of the company acting through its recognized agents. But the shareholder, to divest himself of his liability to the company in an action for calls, must repudiate the shares, and cannot in general divest himself of his liability, as a contributory to creditors of the company on a winding-up, or a *seire facias*. If the shareholder be induced to subscribe by the fraud of a promoter, he must pay calls, and may sue the promoter. Fraud.

Before we leave the subject now under consideration, it is necessary to refer to some decisions, which show under what circumstances *Infants*, *Bankrupts*, and the *Executors* and *Administrators* of shareholders, are liable to be sued for calls.

Ex. 161; *Shropshire Union R. Co. v. Anderson*, 3 Exch. 401; *Aylesbury R. Co. v. Mount*, 7 M. & G. 808.

(*d*) *Swansea Dock Co. v. Levin*, 20 L. J., Ex. 447.

(*e*) *Norwich and Lowestoft Navigation Co. v. Theobald*, 1 M. & M. 151.

(*f*) 8 & 9 Viet. c. 16, post, vol. II.

(*g*) *Waterford and Dublin R. Co. v. Dalbiac*, 6 Exch. 413; 20 L. J., Ex. 227; 6 Railw. Cas. 753.

(*h*) *Re Jennings*, 1 Ir. Ch. Rep. 236.

(*i*) *Cork and Brandon R. Co. v. Gough*, 17 Jur. 555; 13 C. B. 826. See also

*Shepherd v. Hills*, 11 Exch. 55.

(*j*) *Waterford and Dublin R. Co. v. Logan*, 19 L. J., Q. B. 259; 11 Q. B. 672.

(*k*) 1 L. R., 2 H. L. 325. See also *South Eastern R. Co. v. Habbakuk*, 12 A. & E. 197; 2 Railw. Cas. 247, 250; *Thomas Hare R. Co. v. Mount*, 3 Railw. Cas. 411; *Deposit and General Life Assurance Co. v. Ayscough*, 6 E. & B. 761; 26 L. J., Q. B. 29; *Birch v. Phoenix Loan Mining Co. v. Baynes*, L. R., 2 Ex. 324; 36 L. J., Ex. 183.

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holders.**Infant share-  
holders.*

First, as to infant shareholders. By the express words of the statute, an infant is capable of becoming a shareholder (*l*); and it is clearly settled, that if he be registered whilst an infant, and remains a shareholder afterwards, he becomes liable to pay calls, whether they were made during or since his infancy, for the fact of his permitting his name to remain on the register as a proprietor of shares amounts to a ratification of the contract to become a shareholder (*m*). And an infant cannot defeat an action to recover calls by the defence that he was an infant when the calls were made; or that he was an infant at the time of becoming a holder of the shares, in respect of which the calls became payable; for, as he may have lawfully received the shares by bequest, or by purchase from the original proprietor, he must show on his defence the special circumstances which relieve him from liability—such as a disclaimer of the contract when he became of age (*n*).

So where, in addition to the pleas above mentioned, the defendant pleaded that he had never ratified, or at any time derived any profit, by being proprietor of the shares, and that the proprietorship had always been useless to him; the pleas were held to be insufficient, because, if the defendant had attained his majority, he ought to have averred that he then disclaimed the contract, and if he was still under age, that fact ought to have appeared on the face of the plea (*o*).

It seems, however, that if an infant becomes a shareholder by purchase during his infancy, he may disaffirm the contract either when he becomes of age, or during his minority (*p*). The repudiation must be within a reasonable time (*q*), and unequivocal (*r*).

The result of the cases seems therefore to be, that infant proprietors of railway shares are treated as purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, with certain obligations attached, which they are bound to discharge—like an infant purchaser of real estate, who has taken possession, and thereby becomes liable to all the obligations attached to the estate; unless he has elected to waive or disagree to the purchase altogether, either during infancy, or after full age, at either of which times it is competent for an infant to do so (*s*).

(*l*) 8 & 9 Vict. c. 16, s. 70, post, Appendix. But a mandamus to register an infant shareholder has been refused in Ireland. Post, p. 199, n. (1).

(*m*) *Carl and Brandon R. Co. v. Cassano*, 10 Q. B. 935.

(*n*) *Leid and Thet R. Co. v. Fiddale*, 1 Exch. 25; 15 L. J., Ex. 339; *Bucknold R. Co. v. Falder*, 5 Exch. 111; 20 L. J., Ex. 97.

(*o*) *North Western R. Co. v. M'Michael*, 5 Ex. 124; 20 L. J., Ex. 97.

(*p*) *Norwich and Exeter R. Co. v.*

*Combs*, 3 Exch. 565; 18 L. J., Ex. 325.

(*q*) *Dublin and Wicklow R. Co. v. Black*, 22 L. J., Ex. 94; 8 Exch. 181. See also *Elliott's case*, L. R., 5 Ch. 302.

(*r*) *Middleton & W. R. Co. v. Quinn*, 1 H. C. L. R. 383.

(*s*) *North Western R. Co. v. M'Michael*, 5 Exch. 124; 20 L. J., Ex. 97. See further on this subject "Simpson on Infancy," A.D. 1875; Infants' Relief Act, 1874, 37 & 38 Vict. c. 62. Where an infant employed a stockbroker to sell shares on his account, and the stockbroker after-

As to a bankrupt shareholder, his trustee in bankruptcy may exercise the right to transfer his stock or shares "to the same extent as the bankrupt might have exercised it if he had not become bankrupt" (f), or, if the stock or shares be unsaleable or not readily saleable by reason of the liability to calls, may disclaim them within 3 months of his appointment, and the disclaimer will operate to determine all the rights and liabilities of the bankrupt in the stock or shares (u).

Bankrupt  
shareholder.

Lastly, as to the recovery of calls from executors and administrators. The personal representatives of shareholders are, by the express words of the 21st section of the Companies (Clauses) Consolidation Act, made liable to pay calls (v).

Executors and  
administrators.

Whether future calls payable on shares should be ultimately paid out of the testator's estate, or by the parties to whom the shares have been bequeathed, is sometimes a doubtful question, depending in each instance upon the terms of the bequest (y).

Bequest of  
shares.

The current of recent decisions tends to show that where shares are specifically bequeathed, calls due before the death of the testator must be paid out of his general estate, but calls due subsequently must be paid by the specific legatee, who takes *cum onere* (z). In a case in which a testator gave to his son "any shares in railways, mines, and other undertakings that may belong to me at my decease," *Kindersley, V.-C.*, held that whatever payment was due at the time of the testator's death to constitute him a complete shareholder in the concern, and whatever calls were made at his death, must be paid out of his general assets; but if at his death he was constituted a complete shareholder in the concern, whether it was a going concern at his death or not, whether it was partially or wholly completed, all the calls made subsequently to the death of the testator must be borne by the specific legatee (a).

Bequest of  
shares.

wards sold the shares and received the purchase-money, and handed over a transfer from the infant, and placed the purchase-money to the credit of a debt which was due to him from the infant in respect of dealings between them for shares, *Bryce, V.-C.*, held that the purchaser of the shares had no remedy in equity against the infant after he became of age, on the ground that fraud had been practised by him, although the railway company had refused to register the transfer of the shares, because it was made during infancy. *Stikeman v. Dawson*, 1 De G. & S. 90; 16 L. J., Ch. 205.

(f) Bankruptcy Act, 1883, s. 50, sub. 3.  
(u) *Ib.* s. 55, sub. 2.

(v) Calls, although specialty debts (*York and Emdon R. Co. v. Goode*, 17 Jur. 555), have now no priority over simple contract debts. 39 & 40 Vict. c. 48.

(y) Some cases determined before the passing of the Companies (Clauses) Consolidation Act are to be found in the books. When the executor of an original subscriber to a railway company was held to be liable to pay calls made in the lifetime of the testator, as well as those made after his death, see *Pyler v. Pyler*, 2 Bail. Chs. 813; 3 Beav. 550; *Blount v. Hopkins*, 7 Sim. 51. So in the case of an administrator of a subscriber to a projected rail who died before the act passed for making it: *Ward v. Kent Canal Co. v. Robinson*, 5 Tannt. 801.

(z) *Fittrill v. Williams v. Kelly*, 10 Hare, 265; 22 L. J., Ch. 1916; *Arundson v. Bunt*, 20 Beav. 421; 21 L. J., Ch. 473; *Adams v. Perick*, 26 Beav. 381; 28 L. J., Ch. 591; *Thay v. Day*, 29 L. J., Ch. 466; *Re Doe*, 43 L. J., Ch. 42 (q.v. shares).

(a) *Thay v. Day*, *supra*.

3. Calls on Share-  
holders.*Jacques v.  
Chambers.*

In a case in equity, a testator who, at the time of his death, was possessed of fifty original and seventy purchased shares in a railway, in respect of which all calls had not been made, by his will gave thirty whole shares in the railway to trustees for the benefit of a married woman for life, without power of anticipation, and thirty shares to B.; and he declared that the legacies should not be held to be specific, so as to be capable of ademption. By a resolution of the railway company, new quarter shares were raised and offered rateably to the registered proprietors. Sixty new shares were offered to and accepted by the exdutors, and the deposit thereon was paid by them. It was decided that the bequests were specific, and that the income of the shares from the time of the testator's death belonged to the legatees; that the legatees were entitled to so many of the new shares as had been allotted in respect of the whole shares bequeathed to them, subject to the payment of the future calls, and that the testator's estate was liable to pay the calls on the whole shares purchased by the testator, as well as on the original shares; and a sufficient sum to cover the unpaid calls was ordered to be placed to a separate account, and laid out, and the income meanwhile paid to the persons entitled (b).

Bequest of  
"shares" will  
pass stock.

It was at one time held that a bequest of "railway shares" does not pass railway stock (c), but an express decision in the House of Lords (d) has now established the contrary. Where a testatrix bequeathed some railway shares "and all her right, title and interest therein," it was ruled in equity, that money which the testatrix had paid in advance beyond the calls passed to the legatee (e).

And where a testator gave to trustees all his leasehold estates, and the residue of his monies, chattels, funds, railway shares, and other personal estate, on trust to convert into money all such parts as should not consist of government securities or railway shares, and apply the monies arising for the benefit of his wife and children, and after the death of his wife, if there should be no children, the testator directed his real estate to be sold, and the money arising therefrom, and from his residuary personal estate and effects, to be held upon certain trusts: it was decided that the railway shares passed in the gift over after the death of the widow (f).

(b) *Jacques v. Chambers*, 4 Railw. Cas. 205, 499; 15 L. J., Ch. 225; 11 Jur. 295.

(c) *Oakes v. Oakes*, 9 Hare, 606.

(d) *Morris v. Ashmore*, 12 R. 7 H. L. 717; 45 L. J., Ch. 614; 34 L. T. 218; 21 W. R. 587; affirming the Lords Justices, who had reversed Jessel, M. R.

(e) *Tanner v. Tanner*, 11 Beav. 69; 17 L. J., Ch. 115; 12 Jur. 87. Where a bequest was made, whereby a testator gave

the interest and proceeds of his property to persons for life, with a gift over, and a portion of his estate consisted of railway shares, Romilly, M. R., decreed, that any person having an interest in the fund was entitled to have the shares sold, and the proceeds invested in the funds. *Thornton v. Ellis*, 21 L. J., Ch. 714.

(f) *Sartoris v. Hopkinson*, 18 L. J., Ch. 155.

4. *Transfer of Shares.*

4. *Transfer of Shares.*

With respect to the transfer of shares, the Companies Clauses Act provides, that every shareholder may sell and transfer his shares or his interest in the capital stock (y), by deed duly stamped, which *must* be according to the form annexed to the act: (8 & 9 Vict. c. 16, s. 14, vol. II.) The 16th section restricts transfer until pending calls are paid, and the special act usually suspends vesting of shares altogether until one-fifth is paid up. With these exceptions it seems open to any shareholder to transfer his shares to a man of straw (b). But although the directors have no power to object to a transfer on the ground of insolvency, it is conceived that they might refuse to register a transfer to an infant, lunatic or other person not *sui juris* (i).

Every shareholder may sell his shares.

The stamp duty on a transfer is regulated by the Stamp Act, 1870, 33 & 34 Vict. c. 97, in accordance not with the nominal value, but with the amount of the consideration paid, under a scale which puts the duty at 10s., if such consideration does not exceed 100l., and if it does, at 10s. per cent. By the Customs and Inland Revenue Act, 1887, 50 & 51 Vict. c. 15, s. 8—16, companies are allowed to compound for stamp duties on transfers by the payment of 6d. for every 100l. of stock of all kinds. After such composition, the transfers become exempt from duty, but the compounding company may require, in addition to any fee exigible on registration, payment of an amount not exceeding the amount of stamp duty which would have been payable on the transfer if the agreement for composition had not been entered into.

Stamp on transfer.

Composition of stamp duty.

It will be observed, that the use of the form given by the statute is discretionary and not compulsory. But it is best always to adopt it, as the following sect. (15), which will be considered presently, directs that the deed of transfer shall be kept by the secretary of the company. And if it is intended to declare any trusts of the shares, or if the transfer relates to shares in more than one company, difficulties may arise, as the deed cannot, of course, be kept by more than one company; and where there are trusts, it is highly inconvenient that any company should have any deed declaring them. Convenience requires that the transfer which is to be kept by the company

The deed of transfer.

Trust.

(y) The stock of a railway company is included in "stock," as defined by the Lunacy Regulation Act, 1853, 16 & 17 Vict. c. 70, and an order may be made, under sect. 140 of that act, for the transfer into the name of the Paymaster-General of stock of that description belonging to a lunatic. *Re Ives*, 32 L. J., Ch. 673.

(b) See *Muddersfield Canal Co. v. Buck-*

*Shannon R. Co.*, 9 L. T. 151, and p. 109, n. (c), post. It will be seen that the form requires the seals of both transferor and transferee. This is in order that the company may have some one on the register who is bound to pay calls, and would therefore seem to be *operative* as against the company, though, perhaps, directory merely as between the parties.

(i) See sect. 4 of this Chapter, post.



4. *Transfer of Shares.*

*Copeland v. North Eastern R. Co.*

Personal liability of trustees.

Deeds in blank.

should be a simple conveyance of the legal title, merely showing who is shareholder. And it is expressly provided by the statute, that the company is not bound to see to the execution of a trust (*k*). In such cases then there should be a separate deed of transfer for each company, and, if necessary, a separate declaration of trust. The necessity of this caution is exemplified by the following case:—The holder of shares in a railway company, whose act incorporated the Companies Clauses Act, conveyed the shares, along with much other property, by a deed, not in the form given by the act, in consideration of 10s., and the natural love and affection which he bore to his sister, to a trustee in trust for her. It was held that this, though not a *sale*, was a *transfer* within the meaning of sect. 14, (and not a transmission within sects. 18, 19,) and, consequently, that the trustee was not entitled to be registered as holder of the shares without delivering the deed to the secretary, to be kept by him as provided by sect. 15 (*l*); and it has been since laid down that it is essential to the legal efficacy of a transfer, that it should be delivered to the secretary of the company, to be kept by him in accordance with sect. 15 (*m*). It has however been decided that two or more persons possessed of shares may join, and by one deed transfer their interests to a purchaser; and, in such a case, it is sufficient if the ad valorem stamp is attached, calculated on the consideration paid for the whole shares collectively (*n*).

Trustees are personally liable to the company for calls (*o*), having, however, a right to an indemnity out of the trust fund as far as it will go (*p*).

Deeds of transfer should never be executed by the vendor with blanks for either the amount of shares or the name of the purchaser, as such deeds, though not recognized by the Committee of the London Stock Exchange (*q*), and void for most purposes (*r*), may yet, perhaps, in the hands of a *bond fide* purchaser for value without notice, be held to be good by estoppel as against the vendor, who may thus be cheated out of shares which he never intended to part with. Executing a transfer in blank is in truth, as was said by Parke, B., in *Hibbwhite v. M'Morine*, an attempt to make a deed transferable and negotiable like a bill of exchange or exchequer bill,

(*k*) 8 & 9 Vict. c. 16, s. 20.

(*l*) *Copeland v. North Eastern R. Co.*, 6 L. & N. 277.

(*m*) *Attwood v. Morgan*, L. R., 35 Ch. D. 598, per Stirling, J., stating also that this was the effect of *Copeland v. North Eastern R. Co.*, aff. by C. A., W. N. 104 Dec. 10th, 1887.

(*n*) *Hills v. Budge*, 1 Exch. 193; 18 L. J., Ex. 384. Where shares are purchased in another person's name, in order to constitute a *gift* of the shares, there

must be a present intention to confer an interest. *Forrest v. Forrest*, 31 L. J., Ch. 428.

(*o*) *Muir v. City of Glasgow Bank*, L. R., 4 App. Cas. 337; 40 L. T. 339.

(*p*) *Cross v. Paine*, L. R., 4 Ch. 411; *Hannay v. Maddock*, L. R., 7 Ch. 395.

(*q*) Rule 87 of the Stock Exchange Rules.

(*r*) *Hibbwhite v. M'Morine*, 6 M. & W. 200, approved by the House of Lords in *Sauv. Genoulx de Paris v. Walker*, L. R., 11 App. Cas. 20.

which the law does not permit. The following cases show the folly of such an attempt:—T. being the holder of certain 20*l.* shares, and also of certain 2*l.* shares in the same company, instructed his broker to sell the latter. The broker sold the 20*l.* shares, and brought to T. for execution deeds of transfer, in which blanks were left for the name of the transferee and the number and numbers of the shares. The deeds bore stamps high enough to carry the 20*l.* shares, and were executed in blank by T. The deeds were delivered in this condition, together with the certificates for the 20*l.* shares, which had been fraudulently obtained by the broker, to *bona fide* purchasers, who filled up the blanks. Upon a bill filed by T., it was held by Wood, V.-C., and his decision was affirmed on appeal, that the deeds of transfer were void, and that he was entitled to the shares expressed to be transferred thereby, and to have his name restored to the register (*s*). But in another case, in which S., a holder of shares in a joint-stock company, was induced by O., his broker, to entrust him with deeds of transfer signed by S. in blank, and O., having afterwards stolen from S. certain share certificates, was enabled, by means of the blank transfers, to transfer to innocent purchasers for value the share certificates, and the names of the transferees were in due course entered on the register as shareholders instead of S.: upon a rule by S., under the Joint-Stock Companies Acts, to rectify the register, the Court of Common Pleas were equally divided in opinion as to whether they should interfere or not, and the rule dropped (*t*). A similar application was afterwards made to the Court of Exchequer, who directed an action to be brought by S. against the company, in order that the question might be put on the record. An action was brought, and a verdict found for the plaintiff, subject to a special case. But upon argument the Court of Exchequer also were equally divided in opinion (*u*). Judgment, however, was given for the plaintiff, and that judgment was ultimately upheld in the Exchequer Chamber, though not without some difference of opinion amongst the members of the Court (*x*).

Deeds of transfer in blank.

*Taylor v. Great Indian Peninsular R. Co.*

*Ex parte Swan.*

It is in general the duty of the purchaser to tender the deed of transfer to the vendor for execution, as in the case of a sale of realty; that is to say, the purchaser cannot *bring an action* against the latter, for a breach of contract, in not delivering or transferring the shares,

Tender of deed of transfer.

(*s*) *Taylor v. Great Indian Peninsular R. Co.*, 24 L. J., Ch. 285, 709; 4 De G. & J. 559. See *Cotton v. Eastern Counties R. Co.*, 1 Johns. & Hemm. 213.

(*t*) *Ex parte Swan*, 7 C. B., N. S. 400; S. C., 30 L. J., C. P. 113. See also *Tupper v. Foulkes*, ib. 214.

(*u*) *Swan v. North British Australasian*

*Co.*, 31 L. J., Ex. 425; 7 H. & N. 603. The judgments in this case, in all three Courts, are well worthy of perusal, but are too long for insertion here. And see also *Shropshire Union Railway and Canal Co. v. The Queen*, L. R., 7 H. L. 496, and p. 111, post.

(*x*) 32 L. J., Ex. 273; 2 H. & C. 175.

4. *Transfer of  
Shares.**Copeland v. North  
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Deeds of transfer in blank.  
*Taylor v. Great Indian Peninsula R. Co.*

*Ex parte Swan.*

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4. *Transfer of  
Shares.*

without averring and proving such tender of the deed on his part (y). But by the custom of the Stock Exchange, and it is believed most other share-markets, it is the duty of the vendor to prepare the transfer deed and reclaim the amount of the stamps from the purchaser (z). If the transfer requires the assent of the directors to make it valid, it depends a good deal, if not entirely, on the usage of the Stock Exchange in which the shares were purchased, whether it is the duty of the vendor or of the purchaser to obtain such consent. In general, it would seem that there is no absolute undertaking on the part of the vendor to obtain it. He is responsible, indeed, for the genuineness and regularity of all documents delivered, and bound to execute a transfer; but it is the duty of the purchaser to execute and duly lodge such documents for verification and registration in the books of the company, and to obtain a certificate of registration; and it would therefore seem to be the purchaser's duty, in the first instance, to endeavour to obtain the consent of the directors. At the utmost, the vendor is only bound to obtain such consent after the purchaser has done what is reasonable to obtain it in the usual course (a).

An auctioneer who sells shares at a public auction without declaring the name of his principal, makes himself personally responsible for the fulfilment of the contract of sale (b).

Refusal to accept  
shares.

If shares are sold and the vendor prepares a deed of transfer, and demands the name of the transferee, which is refused, and the contract abandoned by the vendee, the vendor may sue the vendee for refusing to accept the shares; and, although at the time the deed of transfer was tendered there were calls unpaid, the defendant cannot set up as an answer that the plaintiffs were not ready and willing to transfer the shares, because when the plaintiffs demanded the name of the purchaser, they were in a condition, by paying the call, to make a valid transfer (c).

Re-transfer in  
case of fraud.

If a vendee of shares has been induced to purchase them by means of false statements made by the vendors, as to material facts relating to the condition and prosperity of the company, equity will decree the re-payment of the purchase-money with interest, and the re-transfer of the shares to the fraudulent vendors (d). But if between

(y) *Shephard v. In. Midland*, 4 Q. B. 128; *Boulton v. Bull*, 3 C. B. 291; 16 L. J., C. P. 18; 10 Jur. 639, *N. C.*

(z) See also *Shaw v. Bealey*, 16 L. J., Ex. 180; 11 Jur. 911. In *Taylor v. Stray*, 26 L. J., C. P. 185, 287, the vendor, being anxious to get rid of his shares, prepared and executed and tendered to the purchaser

But see also *Leman v. Lloyd*, 11 L. J., Q. B. 165; *Williamson v. Lloyd*, 7 Q. B. 43, in which cases, however, the contract was not made on the Stock Exchange; the difference of these cases is further explained in *Stray v. Russell*.

(d) *Franklyn v. Lomond*, 4 C. B. 637; 16 L. J., C. P. 221.

the making of the contract and the discovery of the fraud, the vendee receive dividends or otherwise deal with the shares, he could not treat the contract as void, but must bring an action on the deceit, and recover his real damage (e). So if directors make false representations for the purpose of fictitiously enhancing the price of shares for their own benefit, and a purchaser is thereby deceived and induced to purchase shares greatly beyond their value, the transfer of the shares will be set aside (f); and if a prospectus misrepresent material facts, so that a person reading it is thereby deceived into becoming an allottee of shares, and in consequence suffers loss, he may proceed against the directors who issued the prospectus. But the responsibility of the directors does not follow the shares on their transfer from an allottee to his vendee, and the vendee cannot successfully proceed against the directors for the misrepresentation either at law or in equity, unless he can show some direct connection between them and himself in the communication of the prospectus which influenced his conduct in becoming a purchaser (g).

It may here be remarked that the company are bound to replace stock transferred by a forged transfer, as a forged deed is a mere nullity (h).

Forged transfer.

The transfer must be executed by the transferee (i), and duly entered in the register of transfers in the manner directed by the statute, inasmuch as the body of shareholders agree to carry on the undertaking under all the provisions contained in the act of Parliament. The Court of Exchequer in one case held that an informal transfer would not bind the company (k). But, in the same case, it was afterwards ruled in equity, and that ruling was upheld in the House of Lords, that as the transfer was made in the usual manner by the secretary of the company, and was subsequently adopted by the company as being regularly made, the transaction was valid as between the company and the original transferor (l).

The register of transfers.

(e) *Clarke v. Dickson*, E. B. & E. 148; 27 L. J., Q. B. 223.

(f) *Burnes v. Pennell*, 2 H. L. C. 522. See also *Nicol's Case*, 28 L. J., Ch. 257; 3 De G. & J. 387, et cas. ib. cit.; *Frowd's Case*, 30 L. J., Ch. 322; *Kisch v. Central R. Co. of Venezuela*, 34 L. J., Ch. 545; 36 L. J., Ch. 849; *Keenedy v. Panama, &c. Royal Mail Co.*, 36 L. J., Q. B. 260; *Re Overend, Gurney & Co.*, 36 L. J., Ch. 949; *Hallows v. Frazer*, 3 L. R., Ch. 467; 36 L. J., Ch. 267.

(g) *Peck v. Gurney*, L. R., 6 H. L. 377.

(h) *Taylor v. Midland R. Co.*, 29 L. J., Ch. 781; 31 L. J., Ch. 336; 8 H. L. C. 751. But where the secretary of a joint

against the company for damages, it was held that he was not entitled to relief. *Duncan v. Huttley*, 2 Macn. & Gird. 30; 2 Hall & Twells. 78. As to the right of the transferee whose name has been registered and erased to call on the company for compensation, see *Re Bahia and San Francisco R. Co.*, 37 L. J., Q. B. 176.

(i) *Re Imperial Mercantile Credit Association*, 36 L. J., Ch. 168.

(k) *Baranquit v. Shortridge*, 4 Exch. 699; 20 L. J., Ex. 27.

(l) *Shortridge v. Bosanquet*, 16 Jur. 919; 15 Beav. 84; N. C. in the House of Lords, nomine *Burgin v. Shortridge*, 5 H. L. C. 297; and see *Ex parte Strufford*, 22 L. J., Ch. 364; 36 Jur. 125; 10 L. R. 101.

## 4. Transfer of shares.

## Registration of transfers.

The deed of transfer *must be delivered to the secretary of the company*, who enters a memorial thereof in the "Register of Transfers," and delivers to the purchaser a new certificate, or indorses a memorandum of the transfer on the old one (*n*). Until a transfer has been thus delivered, the vendor continues liable for all calls, and the purchaser is not entitled to receive profits, or to vote: (8 & 9 Vict. c. 16, s. 15, post, vol. II.)

Restriction upon transfers until calls paid.  
C. C. Act, s. 16.

No shareholder may transfer any share after any call shall have been made in respect thereof until he has paid such call, or until he has paid all calls for the time being due (*n*) on every share held by him: (Sect. 16.) The meaning of this section, which applies only to shares subject to calls, and not to paid-up shares or consolidated stock (*o*), is, that during the time that the calls remain unpaid, the right to transfer the shares is taken away, and the deed of transfer is void as against the company, though valid as between the parties, so that the company may refuse to register such a transfer, although the calls have been subsequently paid up (*p*). In such a case it would be necessary to re-execute the deed of transfer, before the company can be compelled to register it (*q*). A different question would, however, arise, if the deed had been delivered as an escrow, to take effect upon payment of the calls by the transferor (*r*).

But the section is for the protection of the company, and not of its creditors, and if the directors assent to a transfer on which calls are due, the transferor cannot be placed on the list of contributories (*s*).

## Neglect of transferee to register.

If shares are sold, and the transfer signed by the vendor, but the vendee neglects to register it, so that the company are entitled to demand payment of calls made subsequently to the sale from the vendor, whose name remains on the register, an action for specific performance of the contract may be maintained by the vendor to compel the vendee to register the transfer and pay the calls (*t*). The

(*n*) *Wilkinson v. Lloyd*, 7 Q. B. 27; 9 Jur. 328. It would seem that companies have no right, except perhaps in cases of forgery or fraud, to cancel an entry and remove a person's name from the register. *Hare v. L. and N. W. R. Co.*, 30 L. J., Ch. 521, n.; 2 Johns. & Hemm. 80; *Ward v. South Eastern R. Co.*, 29 L. J., Q. B. 177.

(*o*) See 32 L. J., Ch. 637; and *R. v. Inns of Court Hotel Co.*, 32 L. J., Q. B. 369.

(*p*) *Hubberty v. Manchester, Sheffield and Lancashire R. Co.*, 36 L. J., Q. B. 33, 198; L. R. 2 Q. B. 59, 471, (Exch. Ch.).

(*q*) *R. v. W'ing*, 17 Q. B. 615.

(*r*) It is, however, very questionable whether a fresh deed would not be neces-

and *Brighton R. Co. v. Fairclough*, 2 M. & G. 674.

(*s*) *Hall v. Norfolk Estuary Co.*, 16 Jur. 149; 21 L. J., Q. B. 94. A transfer made when the name of the vendee is left in blank is void. But the shares do not remain in the "order and disposition" of the transferor. *Morris v. Unana*, 31 L. J., Ch. 125.

(*t*) *In re Hoylake R. Co.*, L. R., 9 Ch. 257; 43 L. J., Ch. 529; 30 L. T. 213; 22 W. R. 443.

(*u*) *Shaw v. Fisher*, 2 De G. & S. 11; 12 Jur. 152; 5 De G., M. & G. 596; *W'gan v. Price*, 3 De G. & S. 311; 13 Jur. 295. It is said in this case that shares are sometimes sold on the Stock Exchange, on the terms that the purchaser shall give a guarantee of registration; but Bruce.

principle is, that when shares are sold, it must be taken to be part of the contract, that the vendor should be indemnified by the purchaser from all liability in respect of subsequent calls made on the shares (*u*). A stock-jobber is liable, if his nominee had no legal capacity to accept the shares purchased, to indemnify the vendor against calls, although the time limited by the rules of the Stock Exchange for approval or rejection of the name of the ultimate purchaser has been allowed to go by without objection (*x*).

So where certain railway shares were sold by auction, and the purchaser paid his purchase-money, but did not take a transfer of the shares, and then sold to a third party, who refused to register himself as owner of the shares, and calls were made on the shares, which were left unpaid; it was held, that the original vendor was entitled to a decree for specific performance, against the original purchaser (*y*). If, through the neglect of the purchaser of shares to register them, the vendor is compelled to pay calls, he cannot recover the money back as money paid to the defendant's use (*z*); but he may maintain an action against the purchaser upon his implied promise to indemnify the vendor (*v*).

If the company, without cause, refuse to register shares and deliver new certificates after the deed of transfer has been sent to the secretary, such a breach of duty would entitle the transferee to sustain an action for damages against the company (*b*); and he might also obtain a mandamus—peremptory in the first instance, if there were no issues of fact to be tried—commanding the company to register the transfer (*c*). Moreover, it is clearly a wrongful act, for which an

Refusal of company to register.

stipulation made no difference. See also *Huckins v. Malby*, 37 L. J., Ch. 58; L. R., 4 Eq. 572; *Evans v. Wood*, 37 L. J., Ch. 159; *Paine v. Hutchinson*, 36 L. J., Ch. 169; 37 L. J., Ch. 485; L. R., 3 Ch. 388; *Hodkinson v. Kelly*, 16 W. R. 1078; *Coles v. Bristow*, L. R., 6 Eq. 140.

(*u*) *Jacques v. Chambers*, 4 Railw. Cas. 502, per Bruce, V.-C.

(*z*) *Nickalls v. Merry*, L. R., 7 II. L. 530. And see that case and the decisions there cited, generally, as to the liability of different parties where shares are sold on the Stock Exchange, and as to the effect of the rules of the Stock Exchange.

(*y*) *Shaw v. Fisher*, *ubi supra*.

(*c*) *Sayles v. Blane*, 6 Railw. Cas. 79; 10 L. J., Q. B. 19; 14 Q. B. 205.

(*a*) *Walker v. Bartlett*, 18 C. B. 845.

(*b*) A declaration against the East India Company, for refusing to transfer stock, was held insufficient, because it was not alleged that the name of the transferee was presented to the company.

the proposal to transfer. *Gregory v. East India Co.*, 7 Q. B. 199. See also *Wilkinson v. Anglo-Californian Gold Mining Co.*, 18 Q. B. 728; *Stewart v. Same Co.*, 18 Q. B. 738.

(*c*) *R. v. General Cemetery Co.*, 6 E. & B. 415; *Copeland v. North Eastern R. Co.*, 6 E. & B. 277; *Norris v. Irish Land Co.*, 8 E. & B. 512; 27 L. J., Q. B. 115; *Ward v. South Eastern R. Co.*, 29 L. J., Q. B. 177. See also *R. v. Worcester Canal Co.*, 1 M. & B. 529; *R. v. Liverpool and Newcastle R. Co.*, 21 L. J., Q. B. 284; 16 Jur. 949. In *R. v. Midland Counties and Shannon R. Co.*, 9 L. T. 151; 15 Ir. C. L. R. 525, the Court of Queen's Bench in Ireland, on the application of the transferee, granted a mandamus to register a transfer of shares to a pauper, though the consideration was a mere fiction, and the transfer was made to get rid of liability, but was not subject to any secret trust for the benefit of the transferor. But in *R. v. Same Co.*, 9 L. T. 155; 15 Ir. C. L. R. 514, the same Court refused, on the



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action for damages may be sustained, if, in consequence of the refusal of the company to register a transfer, calls are not paid, and the company thereupon proceed to declare the shares forfeited, and afterwards sell them (d).

Married woman.

At common law the shares of an unmarried woman became the property of her husband upon her marriage, and shares coming to a married woman during marriage vested in him, but the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, repealing, but re-enacting with considerable amendments, the Married Women's Property Act, 1870 (a), has entirely altered the law. The Act of 1882, after providing that a married woman is to be capable of holding property as if she were unmarried, and that property belonging or coming to her after the commencement of the Act (1st Jan. 1883) is to be held by her as if she were unmarried, deals with stock and shares as follows :—

By s. 6 stock and shares which at the commencement of the Act (1st Jan. 1883) were standing in the sole name of a married woman are to be "deemed, unless and until the contrary be shown, to be the separate property of such married woman," and the fact that such stock or shares stand in the sole name of a married woman, "shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, &c., without the concurrence of her husband."

By sect. 7 stocks and shares transferred in or into the sole name of a married woman shall, until the contrary be shown, be deemed to be her separate property, but it is expressly provided that no joint stock company shall be compelled to admit a married woman to hold stock or shares "to which any liability may be incident" contrary to any act of Parliament regulating the company.

By sects. 8 and 9 stock and shares standing in the names of a married woman and other persons are to be deemed her separate property so far as her own title goes, and her husband need not join in the transfer of such stock or shares.

By sect. 10, if a wife buy stock or shares with her husband's money but without his consent, a judge, either of the High Court or of a County Court, may order such shares or stock to be re-transferred to the husband.

mandamus to register a transfer to an infant, as he might afterwards repudiate them.

(d) *Catchpole v. Amburgh R. Co.* 1 L. & B. 111; and see *Williamson v. Anglo-Californian Gold Co.*, 18 Q. B. 728; 21

L. J., Q. B. 327; *Cochran v. Van Die-men's Land Co.*, 18 C. B. 451.

( ) For mandamus to directors under this act to investigate title of married woman, see *R. v. Carnatic R. Co.*, L. R., 8 Q. B. 299. •

The register of transfers may be closed for a certain number of days before each ordinary meeting, and any transfer made whilst the register is so closed as between the company and the transferee, is considered as made subsequently to the ordinary meeting: (8 & 9 Vict. c. 16, s. 17.)

If a share becomes transmitted by death or bankruptcy (*f*), or by other similar means, the directors may require the transmission to be authenticated by a declaration in writing, which must be left with the secretary, who thereupon enters the names of the persons entitled in the register of shareholders. Until a transmission be so authenticated no person entitled can share in the profits or vote: (Sect. 18.) An extract of the probate or letters of administration, must be produced to the secretary, when shares are transmitted by marriage or death: (Sect. 19.)

Transmission of shares.  
U. C. Act, s. 18.

The company are not bound to see to the execution of any trust to which shares may be subject; and receipts for money, given by the person in whose name any share stands in the books, are a sufficient discharge to the company: (Sect. 20.) This does not prevent the completion of an equitable mortgage (by deposit of shares) by notice to the company, so as to be valid as against the assignees in bankruptcy of the mortgagor claiming the shares under the reputed ownership clause of the Bankrupt Act (*g*). It seems that a mortgagee of shares should give notice of his incumbrance to the company, otherwise he may lose his lien (*h*). Shareholders cannot get rid of their liability to pay calls, except in the mode pointed out in the statute, even in cases where they hold the shares under a trust for the company (*i*). And if directors accept an informal surrender of shares upon an agreement that the surrenderee shall not be required to pay any further calls, a Court of Equity would probably grant an injunction to restrain an action to recover calls brought against other shareholders (*k*). It is the duty of a person receiving certificates as an equitable mortgagee of railway stock, to inquire what is the real position of the mortgagor, for if the mortgagor turn out to be trustee for another, the equitable mortgagee will be unable to enforce his claim in opposition to the original *cestui que trust*. This was decided by the House of Lords in *Shropshire Union R. Co.*

Shares subject to trust.

(*f*) As to when shares remain in the order and disposition of a bankrupt, see *Thompson v. Speira*, 14 L. J., Ch. 453; *Ex parte Boulton*, 26 L. J., Bank. 45; 1 De G. & J. 163; *Ex parte Stewart*, 31 L. J., Bank. 6. It has been held, that after the execution of a transfer in blank, shares were not in the order and disposition of the transferor. *Morris v. Cannan*, 31 L.

(*g*) *Ex parte Stewart*, 31 L. J., Bank. 6.

(*h*) *Cunningham v. Prescott*, 2 V. & Coll. 413; *Ex parte Wadhman*, 1 Mont. & A. 361; *Martin v. Solgwick*, 9 Beav. 351.

(*i*) *Fridon v. Grand Collier Dock Co.*, 11 Sim. 327; *N. C. 2 Railw. Co.*, 350.

(*k*) *Playfair v. Birmingham, Bristol and Thames Junction R. Co.*, 1 Railw. Cas. 610.

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Shares.*

v. *The Queen* (l), in which a director had mortgaged as his own certain shares which he held in trust for the company. No transfer had been executed, and the company had no notice of the transaction, and when, upon the death of the mortgagee, his widow and executrix obtained a transfer from the director, the House had no hesitation in refusing a mandamus to register the widow as transferee.

If a tenant for life pay calls out of his own pocket, the money advanced is of the nature of salvage money, and may be raised by a sale of the shares and repaid, either to himself in his lifetime, or to his executors at his death (m).

5. *Forfeiture of  
Shares.*

For non-pay-  
ment of calls.

5. *Forfeiture of Shares.*

The Companies Clauses Act enacts, that, if any shareholder fail to pay any call payable by him, the directors may, if the call is not paid within two months after it becomes due, declare the share forfeited; and that whether the company have sued for the call or not: (8 & 9 Vict. c. 10, s. 20,\* Vol. II.) But before a share can be declared to be forfeited, the directors must give twenty-one days' notice to the shareholder, such notice to be sent as is prescribed in the act (n): (Sect. 30.) Nor does the declaration of forfeiture take effect until it has been confirmed at a general meeting of the company; and such general meeting may direct the forfeited share to be sold, or otherwise disposed of (o): (Sect. 31.) Forfeited shares may be sold by public auction or private contract: (Sect. 32.) A good title to the purchaser of a forfeited share may be made in the manner prescribed in the act: (Sect. 33.) The company may not sell more shares belonging to a defaulter than are sufficient to pay the calls due and interest and expenses; and the overplus, if any, must be paid to the defaulter: (Sect. 34.) And if the calls, &c., are paid by the defaulter before sale, the share reverts to him: (Sect. 35.)

(l) L. R., 7 H. L. 496; 32 L. T. 233, reversing the decision of the Exchequer Chamber, L. R., 8 Q. B. 435; and affirming that of the Queen's Bench, ib. 420.

(m) *Todd v. Moorhouse*, L. R., 19 Eq. 69; 32 L. T. 8.

(n) When equity will not relieve a shareholder whose shares have been forfeited for non-payment of calls, although the omission to pay the calls arose from accidental circumstances, see *Sparks v. Liverpool & Manchester Ry. Co.*, 10 Ves. 408; and

see *Burkett v. Rawson*, 9 Jur. 341; *Stewart v. Anglo-California Gold Co.*, 21 L. J., Q. B. 303; 18 Q. B. 736.

(o) It would seem that no further notice need be given to the shareholder. *Ex parte Knight*, 36 L. J., Ch. 317. And it would also seem that the name of the shareholder need not be removed from the register. *Re Tarisstock Iron Works*, 36 L. J., Ch. 616; and see *ibid.* as to waiver of forfeiture.

It is to be observed, that, by the express words (p) of the 29th section the share may be forfeited, although an action has been brought to recover the calls. The remedy is therefore cumulative; and it is no answer to an action for calls, that the shares have been forfeited and sold before the action was brought (q). Neither is it an answer that, after action brought the shares were forfeited and cancelled, and that the company, under the provisions of the special act, had issued new shares, in lieu of those which were cancelled. But in either of the above-mentioned cases the party sued is entitled on motion, to the benefit of the sale of the shares, or the value of the new shares, in satisfaction *pro tanto* of the debt due for calls; and on payment of the residue of the debt and costs, the Court will stay the proceedings (r).

The remedy is cumulative.

As to collusive forfeiture of shares, the cases in the note (s) may be consulted with advantage.

By the Companies' Clauses Act, 1863 (t), power is given to every company incorporated either before or after 28th July, 1863, which has obtained a special act incorporating Part I. of the Companies' Clauses Act, 1863, to cancel forfeited shares if they cannot be sold for enough to pay arrears of calls, interest and expenses; but the cancellation does not affect the liability of the last registered holder to pay arrears of calls, interest and expenses: (Sect. 6.)

Cancellation of forfeited shares.

## 6. Traffic in Shares and Scrip on the Stock Exchange.

There were few transactions in railway shares upon the Stock Exchange prior to the year 1824. The first quotation of this species of property occurs in the list published in that year, where an entry appears under the head of "Iron Railways." At that time there were very few railway shares in the market. A daily Price List of Shares is now published in London, with the sanction of the Committee of the London Stock Exchange. The members of the Stock Exchange consist of brokers, and dealers or jobbers. The London Brokers' Relief Act, 1864, has done away with the necessity of the admission of London brokers by the Court of Aldermen. The province of the broker is limited to the trans-

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History of share transactions on the Stock Exchange.

(p) If this provision had not been inserted, it seems that both remedies could not have been resorted to. See *Wells v. Hall*, 3 Ex. 18; 15 L. J., Ex. 53.

(q) *Great Northern R. Co. v. Kennedy*, 4 Exch. 117; 19 L. J., Ex. 11; 6 Railw. Cas. 5; 7 D. & L. 197. As to whether the company would be entitled to interest on calls not paid, see *ibid.*

sider *Stock's Case*, 37 L. J., Ch. 5, 230.

(r) *Duffin v. Great Northern R. Co.* (in House of Lords), per Lord St. Leonards, C., 16 Jan. 1895.

(s) *Brotherhood v. Case*, 31 Bear. 365; 31 L. J., Ch. 861; *Lord Belcher's Case*, 34 L. J., Ch. 503; *Stanhope's Case*, 35 L. J., Ch. 296.

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action of business for his principals. He purchases and sells public securities and shares, for persons desirous to possess or dispose of them. The dealer or jobber acts as an intermediate party between the broker who buys, and the broker who sells (*u*); and the advantage he derives is a small difference of price between the two transactions. When a broker has received an order from his principal, he applies to a jobber, who, being always aware of the prices of shares, enters into a contract with the broker to buy or sell the shares, as the case may be, at the market price (*x*).

Settling days and continuations.

There are, about every fortnight, certain account days, called settling days, when bargains made between buyers and sellers of shares, on the Stock Exchange, are adjusted. Sometimes, instead of transferring the shares, and closing the account on the settling day, the shares are carried on to a future day, on such terms as the parties may agree upon. This is called a *continuation*.

Speculations, how far void as wagers.

These transactions are sometimes mere wagers, and it is necessary to consider the effect of the 18th section of the 8 & 9 Vict. c. 109, which enacts:—

“That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and that no suit shall be brought or maintained in any Court of Law or Equity, for recovering any sum of money or valuable thing alleged to be won upon any wager.”

It has been held that this section applies to transactions relating to the purchase and sale of shares for the account, when neither of the contracting parties contemplate a *bona fide* purchase or sale of the shares (*y*); but this was in a case between two principals, and it is settled by *Thacker v. Hardy* (*z*), that a broker who has made such purely speculative contracts for his principal may recover commission upon them and also an indemnity against the personal liability incurred (*z*); much more, then, as was previously decided, if he has actually paid the “differences,” may he recover the amount (*u*).

Contracts relating to shares are subject to the rules of the Stock Exchange.

The time fixed for the completion of an executory contract, for the sale and purchase of shares, is in most cases liable to be controlled, regulated and altered by the usage of the Stock Exchange. If particular days are set apart by the usage of the stock market, for the settlement of accounts between brokers, and between brokers and their customers, and for the delivery and transfer of shares that have been agreed to be bought and sold in the intervening period, all con-

(*u*) *Keyser on the Stock Exchange*, 22, 229; *Paton on the Stock Exchange*, 27, 12.

(*y*) *Morris v. Tappin*, 2 B. & P. 286.

(*z*) *Thacker v. Hardy*, 21 L. J., C. P. 46; 11 C. B. 538.

(*z*) 1 L. R., 1 Q. B. D. 655; 48 L. J., Q. B. 289—C. A.

(*u*) *Jessopp v. Lutwyche*, 10 Exch. 614; *Knight v. Fitch*, 15 C. B. 566; *Rosecrance v. Rilling*, 33 L. J., C. P. 55. A broker may recover a difference arising on a sale of a prospective railway dividend. *Marten v. Gibbon*, 33 L. T. 562, affirming decision below, 32 L. T. 229.

tracts for the sale and purchase of shares, to be completed on a particular day, will be deemed to be made for the next settling day that will arrive after the time so appointed (*b*). But when no time is specified for the completion of the contract, the printed rules and customs of the Stock Exchange are admissible in evidence to show what is a reasonable time, under all the circumstances of the case, for the fulfilment of the bargain, by the execution, on the part of the vendor, of the deed of transfer of the shares, and the payment on the part of the purchaser, of the purchase-money (*c*).

If, therefore, there is, at a particular place, an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there, has an implied authority to act in the usual course. Thus, where the defendant authorized the plaintiff, a broker, to sell for him twenty railway scrip shares, and the plaintiff sold them to C., another broker, but the scrip shares not being delivered on the day, C. bought twenty other scrip shares at the market price, and claimed the difference between the contract and the market price, and the plaintiff paid him the difference, and afterwards brought an action against the defendant to recover this sum: and it being proved to be the usage amongst brokers at that market to be responsible to each other upon these contracts, and also that the defendant was cognizant of this usage (*d*), it was ruled that the plaintiff was entitled to recover (*e*). •But a principal is not bound if the broker exceed his authority (*f*), and when bound is only bound by such rules of the Stock Exchange as are in force at the time of the employment of the broker (*g*).

If, therefore, a sharebroker has been compelled, by the custom of the Stock Exchange, to pay money on account of his principal, he has a remedy over against the latter (*h*). But he can maintain such an action in those cases only, where he has paid money in discharge of some liability, which he has properly incurred in the regular discharge of his duty as a broker (*i*). And where a broker, in behalf of his principal, purchased shares, which were liable to a call, it was held to be the duty of the principal to supply the broker with money to meet the call (*k*). Again, where a broker gave his principal's

Remedies of  
brokers against  
their principals.

(*b*) *Fletcher v. Marshall*, 15 M. & W. 755; *Mortimer v. McCullin*, 6 M. & W. 58.

(*c*) *Stewart v. Cundy*, 8 M. & W. 160.

(*d*) This fact seems to be immaterial, *Child v. Morley*, 8 T. R. 610; *Sutton v. Tatham*, 10 A. & E. 27.

(*e*) *Bayly v. Butterworth*, 1 Exch. 425.

(*f*) *Bain v. Ewing*, 1 H. & C. 511.

(*g*) *Westropp v. Solomon*, 8 C. B. 315.

(*h*) *Pollock v. Stubbs*, 12 B. B. 771;

17 L. J., Q. B., 351; *Bayley v. Wilkins*, 7 C. B. 599; 15 L. J., C. P. 273; *Taylor v. Stapp*, 26 L. J., C. P. 185, 287; 2 C. B., N. S. 175; *Chapman v. Shephard*, *Whitehead v. Isad*, 36 L. J., C. P. 113; *Bidderman v. Stone*, 36 L. J., C. P. 194.

(*i*) *Barth v. Ball*, 3 C. B. 284; 16 L. J., C. P. 18.

(*k*) *McEwen v. Wood*, 11 Q. B. 13; 17 L. J., Q. B. 296; and see *Bayley v. Wilkins*, 7 C. B. 599; 15 L. J., C. P. 273. When the broker is entitled to recover

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name on the settling day and paid, but the principal refused to sign the transfer, saying he did not want the shares in his name, specific performance was granted in equity at the suit of the vendors, who were dealers, notwithstanding that the company was being wound up; and a direction for indemnity added to the decree (l).

Broker not  
responsible if  
forged scrip  
issued.

A broker employed to buy or sell shares or scrip of a railway company, does not thereby undertake to procure them absolutely and at all events, but only to use due and reasonable diligence to endeavour to do so (m). And if he buy what is ordinarily bought and sold in the stock market as shares, he has fulfilled his commission, and cannot be made responsible for the fraud or misconduct of parties who may have issued the shares without authority. There is no warranty on his part, that the article which passes through his hands is anything more than what it purports on the face of it to be, and what it is generally understood to be in the market (n).

*Lambert v. Heath.*  
Forged scrip.

So where the directors of a railway, called "The Kentish Coast Railway Company," having resolved not to issue scrip, some of the members, without their knowledge, issued scrip, signed by the secretary, from the office of the company; this scrip found its way into the share market, and was sold at a premium. The plaintiff employed his broker to buy some "Kentish Coast Railway Scrip;" and the broker applied to the defendant, who sold him some of the above scrip. In an action to recover the price paid to the defendant, as having sold a spurious article, it was decided, that the question for the jury was, whether the plaintiff intended to buy, and the defendant to sell, that which was current in the market, as Kentish Coast Railway scrip or the real scrip of that company (o).

Stamp on con-  
tract notes.

By the 69th section of the Stamp Act, 1870, the duty on a contract note for the sale or purchase of railway stock or shares to the amount of £l. or upwards is one penny; and such duty may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the note is first executed. And no charge can be recovered

from his principal sums paid by him for deposits, after having delivered an incorrect account, omitting such payments, see *Davis v. Lloyd*, 12 Q. B. 531; 17 L. J., Q. B. 247. See also *Townsend v. Gordon*, 29 L. J., Q. B. 301.

(l) *Paine v. Hutchinson*, 36 L. J., Ch. 169; 37 L. J., Ch. 195; *Hodgkinson v. Kilby*, L. R., 6 Eq. 490; 37 L. J., Ch. 837. As to whether the vendor could maintain specific performance against a sub-purchaser, see *Hawkins v. Matby*, 37 L. J., Ch. 58.

(m) *Plummer v. Marshall*, 15 M. & W. 755. See also *Turpin v. Broun*, 5 M. & G. 155.

(n) Addison on Contracts, 5th ed. 191. But if a broker sell stock, shares or debentures for an undisclosed principal, and sign the sold note, he is responsible for any loss sustained by the purchaser through the fraud of the undisclosed principal, although the purchaser knew that he was dealing with a broker. *Royal Exchange Insurance Co. v. Moore*, 11 W. R. 592; 8 L. T. 212 (Q. B.).

(o) *Lambert v. Heath*, 15 M. & W. 487; 4 R. & W. Cas. 302. See also *Jones v. Doremus*, 1 Q. B. 235; *Mitchell v. Newhall*, 15 M. & W. 308; *Midland Great Western R. Co. v. Gordon*, 16 M. & W. 508.

for brokerage, commission or agency with reference to the sale or purchase of any stock or marketable security of the value of 5*l.* or upwards mentioned or referred to in any contract note, unless such note is duly stamped (*p*).

And by the 25th section of the same act,—

"An instrument the duty upon which is required or permitted by law to be denoted by an adhesive stamp is not to be deemed duly stamped with an adhesive stamp, unless the person required by law to cancel such adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, so that the stamp may be effectually cancelled and rendered incapable of being used for any other instrument, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time."

We have already seen that the transfer of shares must be made in accordance with the directions contained in the Companies (Clauses) Act; and that by analogy with the rule as to the conveyance of real property, it is the duty of the purchaser of shares to prepare the necessary transfer and to incur the expense of the stamp, unless indeed it appears by the terms of the contract, or by the usage of the market, that the seller is to prepare and pay for the transfer (*q*). But it is clearly the duty of the seller to give the purchaser the means of placing his name on the register: and if, through the default of the former, the shares cannot be registered in the purchaser's name, an action will lie against the vendor (*r*). But if, by the terms of the contract, the purchaser is bound to pay a call on the shares, made before the sale, then the broker of the purchaser may pay the amount of the call to the broker of the seller, to enable the latter to make the transfer; and an action will lie against the purchaser, at the suit of his own broker, to recover the money so paid on his account (*s*).

The usage of the Stock Exchange is, that in transactions between members of it there is an implied understanding that on the purchase of stock or shares the buying jobber shall be at liberty by a given day, called the "name day," to substitute another person as buyer, and so relieve himself from further liability on the contract as to the payment of calls, provided that such substituted person be one to whom the original seller cannot reasonably object, and that such

Obligation, not binding on the transferor.

Usage of Stock Exchange.

(*p*) 33 & 34 Vict. c. 97, s. 69. Brokers' notes were formerly held not to require a stamp, not being agreements between party and party. *Tankins v. Siron*, 9 B. & C. 704. In *Knight v. Barber*, 16 M. & W. 66, it was held that an agreement between the plaintiff and the defendant for the sale of railway scrip required an agreement stamp, such scrip not being "goods, wares, or merchandize" within the exemption in

the Stamp Act, 55 Geo. 3, c. 154, Sched. Part I., tit. "Agreement."

(*q*) *Shophos v. De Medina*, 1 Q. B. 124; *Boulton v. Bull*, 3 C. B. 281; 16 L. J., C. P. 18.

(*r*) *Wallison v. Lloyd*, 7 Q. B. 27; *Siron v. Russell*, 28 L. J., Q. B. 279; L. J., Q. B. 115.

(*s*) *Boulton v. Wallis*, 7 Q. B. 80; 19 L. J., C. P. 21.



6. The Stock Exchange.

person accept the transfer and pay the price. And it is now well settled that this is a reasonable usage, and that if shares be sold in the Stock Exchange in the ordinary manner, and the vendor be compelled to pay calls by reason of the ultimate purchaser's default, he is without remedy against the jobber with whom the contract is made (t). But the rules of the Stock Exchange imply that the name of the person given as that of the ultimate purchaser of shares must be that one able and willing to purchase; and they are not satisfied if the name given is that of a non-existent person, a lunatic, an infant, or a person who has not given authority for the use of his name. The contract of a jobber is to accept the shares, or to furnish the name of a person able and willing to accept them: and the time limited by the rules of the Stock Exchange for the approval or rejection of the name of the ultimate purchaser applies only to the responsibility, and not to the personal capacity and willingness of the person whose name is given. If, therefore, the name given in is that of one who had no legal capacity to accept the shares, although the time limited by the rules of the Stock Exchange for objecting to his name is allowed to go by without the objection being made, the jobber is nevertheless liable to make good the calls which the transferor of shares may be compelled to pay by reason of the transferor's default. This was held by the House of Lords in *Nickalls v. Merry* (u). But the jobber's contract is satisfied by giving in the name of a man of straw capable of contracting (x). The distinction between the two cases is thus put by Lord Hatherley in *Nickalls v. Merry*:—

Rule to man of straw.  
*Nickalls v. Merry.*

"The jobber is bound to liberate himself by producing a person capable of contracting. A party who is supposed to be incapable of performing the contract for want of means, but who is capable of entering into the contract, may have given authority to give his name—that is one thing. In that case ten days are given, under the rule of the Stock Exchange, to say whether or not you will accept the contracting party whose name is given to you; for he is really a contracting party: but it is another thing if he is a person who cannot, by law, contract. That a contracting party must be produced I think is beyond doubt."

Mode of assessing damages.

Some cases have been decided as to the proper mode of assessing the damages, in actions relating to contracts in respect of shares. Thus in *debt* for railway scrip, which had been delivered up to the plaintiff after action brought, it was ruled to be a proper direction

(t) *Gressell v. Bristol*, L. R., 1 C. P. 36; 38 L. J., C. P. 10; *Coburn v. Br. Ind.*, L. R., 1 Ch. 3, 38 L. J., Ch. 81. See also *Torrington v. Lowe*, L. R., 1 C. P. 26; 38 L. J., C. P. 121.  
(u) L. R., 7 H. L. 510; 32 L. T. 623;

23 W. R. 663, affirming L. R., 7 Ch. 733, and reversing Bacon, V.-C., ib. 710, n., and *Reade v. Morris*, L. R., 13 Eq. 203.  
(x) *Martindale v. Paine* (No. 2), L. R., 6 Exch. 132, affirming L. R., 4 Ex. 203.

to the jury, that in estimating the damages, they might take into consideration the difference in value of the scrip, at the time of the demand, and at the time of its delivery. Also, that inasmuch as the scrip had already been re-delivered, the verdict and judgment were properly confined to an assessment of damages for the detention (*q*).

In an action against a vendee for not accepting shares on a given day pursuant to contract, the proper measure of damages is the value of the shares on the day when the contract was broken, or on the earliest subsequent day when the shares could be sold (*r*).

So the vendee of shares in a projected railway, under a contract to be completed at a future day, may recover as damages, for the non-delivery, the difference between the price agreed on, and the market price on the day on which the sale should have been completed; but he is not entitled to damages in respect of a further advance of price taking place afterwards at the time of the actual issuing of the scrip (*u*).

The second and three subsequent editions of this work will be found to contain very copious extracts from the rules of the London Stock Exchange, for the time being, but it has not been deemed necessary to include them in the present edition (*b*). A selection of the more important rules is annexed s—

57. The committee will not recognize any dealing in letters of allotment either of loans or shares in new companies.

Letters of stock  
allotment.

58. A member applying for shares or stock of loans or public companies, and neglecting to pay the deposit on the same, shall be considered to have violated a contract, and shall be compelled to fulfil his engagement.

Deposits.

61. The committee will not recognize bargains in prospective dividends of shares or stock of railway or other industrial companies (*r*).

Dividend.

85. An offer to buy or sell an amount of shares or stock at a price named is binding as to any part thereof that may be a marketable quantity; and an offer to buy or sell shares or stock when no amount is named is binding to the amount of ten shares if in value under 500*l*., or a number not exceeding in value that sum, or to the amount of 1,000*l*. stock.

Offers to buy or  
sell.

86. The seller of shares or stock is responsible for the genuineness and regularity of all documents delivered, and for such dividends as may be received until reasonable time has been allowed to the transferee to execute and duly lodge such documents for verification and registration. When an official certificate of registration of such shares or stock has been issued, the committee will not (unless bad faith is alleged against the seller) take cognizance of any subsequent dispute as to title, until the legal issue has been decided, the reasonable expenses of which legal proceedings shall be borne by the seller.

Responsibility of  
seller for the ac-  
curacy of docu-  
ments, and for  
dividends.  
Dispute title  
after registra-  
tion.

(*y*) *Williams v. Archer*, 5 C. B. 318.  
(*z*) *Pott v. Flather*, 11 Jur. 735; 16 L. J., Q. B. 366; 5 Railw. Cas. 85; *Stewart v. Gaulty*, 8 M. & W. 160.

(*a*) *Tempest v. Kilner*, 2 C. B. 300; *Shaw v. Holland*, 15 M. & W. 136; *Powell v. Jessop*, 18 C. B. 336.

(*b*) The rules given in the 6th edition are extracted from the rules dated 1868.

(*c*) This rule must be liberally construed.

Dealings in prospective dividend are common on the Stock Exchange, and brokers are liable to each other for payment in respect of them. *Martin v. Gibson*, 33 L. T. 561, affirming 32 L. T. 229. Where a broker sold the prospective dividend on 50,000*l*. South Eastern Railway Stock, and paid the difference, he is owed the difference from his principal. *Ibid*.

B. The Stock Exchange.	87. The committee will not (except under special circumstances) interfere in any question arising from the delivery of shares, stock, bonds, or debentures by transfer in blank.
Transfers in blank.	93. The deliveror may, previous to delivery, pay any call made on registered shares, although not due, and claim the amount of the issuer of the ticket.
Pending calls.	101. The buyer is entitled to new shares or stock issued in right of old, provided that within reasonable time he specially claim the same in writing from the seller. Claims should be entered as bargains, and as such be checked in the usual manner. When practicable, claims are required to be settled by letters of renunciation; but if not practicable, and there be sufficient time for registration, the seller may, after due notice, require the buyer to complete the bargain in old shares or stock.
New shares.	If the new shares or stock cannot be obtained by letters of renunciation, or by the transfer of the old, the committee will fix a price at which the same shall be temporarily settled, and which amount may be deducted by the buyer from the purchase-money of the old shares or stock until the special settlement.
Accrued interest.	The committee will not entertain any dispute relating to unchecked claims, unless brought before them within ten days after the special settling-day.
Shares in new company.	123. Bonds and debentures of railways in Great Britain, Ireland, and the East Indies, shall be dealt in so that the accrued interest, up to the day for which the bargain was done, be paid by the buyer.
Special settling-day.	124. Bargains in the scrip of a new loan, or the shares of a new company, are contingent on the appointment of a special settling-day.
	127. The committee will appoint a special settling-day for transactions in the shares of a new company, provided that no allegation of fraud be substantiated; that there has been no misrepresentation or suppression of material facts; that sufficient scrip or shares are ready for delivery, and that no impediment exists to the settlement of the account.
Documents required.	128. The secretary to the share and loan department shall give one week's notice to the Stock Exchange of any application for a special settling-day for transactions in the shares of a new company, previously to such application being submitted to the committee, and shall require the production of the following documents, viz. :—
	The prospectus, the act of Parliament, the articles of association, or a certificate that the company is constituted upon the cost-book system, under the statutory laws.
	The original application for shares, the allotment book, signed by the chairman and secretary to the company, and a certificate verified by the statutory declaration of the chairman and the secretary, stating the number of shares applied for and unconditionally allotted to the public, the amount of deposits paid thereon, and that such deposits are absolutely free from any lien.
	The banker's pass-book, and a certificate from the bankers, stating the amount of deposits received.
Quotations of shares of a new company.	129. The committee will order the quotation of a new company in the official list, provided that the company is of bonâ fide character, and of sufficient magnitude and importance; that the requirements of Rule 128 have been complied with, and that the prospectus has been publicly advertised, and agrees substantially with the act of Parliament, or the articles of association; and in the case of limited companies contains the memorandum of association; that it provides for the issue of not less than one-half of the nominal capital, and for the payment of ten per cent. upon the amount subscribed, and sets forth the arrangements for raising the capital, whether by share fully or partly paid up, with the amounts of each respectively, and also states the amount paid, or to be paid, in money or otherwise to concessionaires, owners of property, or others on the formation of the company, or to contractors for works to be executed, and the number of shares, if any, proposed to be conditionally allotted;
	That two-thirds of the whole nominal capital proposed to be issued have been applied for and unconditionally allotted to the public (shares reserved or granted in lieu of money payments to concessionaires, owners of property or others, not being considered to form part of such public allotment), that the articles of association restrain the directors from employing the funds of the company in the purchase of its own shares, and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the

undertaking, and be able to furnish the committee with all particulars they may require.

130. *Bargains in transferable shares or stock shall be quoted ex interest from the beginning of the account in which the interest may become payable, and ex dividend from the beginning of the account following that in which the dividend may have been declared, provided the dividend be made payable to the holders then registered; but in case of a subsequent shutting of a company's books for payment of the dividend, then from the beginning of the account following that in which such shutting occurs.*

*Quotation, of shares ex dividend or ex interest.*

### 7. Mortgages, Bonds, Debentures, &c.

The company may, subject to the restrictions in the special act and by order of a general meeting, borrow money on mortgage (d) or bond (e), and may mortgage the undertaking and the future calls (f) on the shareholders: (8 & 9 Vict. c. 16, s. 38.) If any mortgage or bond be paid off it may be re-borrowed, but "such power of re-borrowing shall not be exercised without the authority of a general meeting of the company: (Sect. 39.) If by the special act money cannot be borrowed until a definite portion of capital is subscribed, or if the authority of a general meeting is necessary, the certificate of a justice is sufficient evidence of the first, and a signed copy of the order of a general meeting is sufficient evidence of the second fact: (Sect. 40.)

*7. Mortgages, Bonds, and Debentures, &c.*  
*8 & 9 Vict. c. 16, s. 38.*

*Consent of general meeting.*

The meaning of the 39th and 40th sections came under the consideration of Wood, V.-C., in a case (g) where a railway company had borrowed without the sanction of a general meeting, and that learned judge, "not without considerable doubt and hesitation," came to the conclusion that the 40th section was directory only, and that debentures issued without the sanction of a general meeting were valid. The learned judge observed:—

(d) Such mortgages and bonds, commonly called "debentures," if, according to Form C in the schedule to the act, are not within the Statute of Mortmain, and therefore can be bequeathed to charitable uses, *Mitchell v. Moberly*, L. R., 6 Ch. D. 655; nor is "debenture stock," as regulated by the Companies Clauses Act, 1863, *Atlee v. Howe*, L. R., 9 Ch. D. 337; 47 L. J., Ch. 863—C. 4., reversing decision of Hall, V.-C., 47 L. J., Ch. 167.

(e) Where a bill was filed against the directors of a railway company, which had power to borrow monies not exceeding 45,000l. "on mortgage or bond," so soon as the whole capital had been subscribed and half paid up, alleging that monies had been illegally borrowed, and praying for a declaration that borrowing was illegal, and for an injunction to restrain the directors

from repaying such sums out of the assets of the company; a demurrer was allowed on the ground that there was no allegation that half the money subscribed had not been paid up, nor that the defendants intended to issue bonds or mortgages before it was due. *Norrell v. Ashover and Rolobridge R. Co.*, 3 Giff. 112.

(f) *Scoble*, this would not include arrears of calls. *King v. Marshall*, 31 L. J., Ch. 163.

(g) *Bouthain v. Carmarthen and Cardigan R. Co.*, 37 L. J., Ch. 429; L. R., 5 Eq. 216. The authority of this case has not been questioned, and is strengthened by *Bell v. Darulith R. Co.*, 1 H. & N. 305, and p. 35, ante; and by *Romford Canal Co., In re*, L. R., 21 Ch. D. 85; 52 L. J., Ch. 729.

*T. Mortgages,  
Bonds, Debentures, &c.*

"In sect. 40 Parliament seems to have provided means whereby persons may inform themselves whether what has been done has been properly done or not. . . Any prudent lender would certainly require that the directors should produce a copy of such an order [the order of a general meeting], although if it were given, notwithstanding that the act says it shall be sufficient evidence of the fact, I take it, it would not be conclusive evidence as between the directors and the company, if no such order had been made. . . . I think the intention of Parliament was not to protect the creditors, but to protect the company against any undue acts on the part of the directors; and I have no doubt that the company, on having heard that the directors were about to do such an act without authority, might have filed a bill to restrain them."

Mortgages and bonds may be by deed duly stamped, wherein the consideration must be truly stated (*h*), and forms are given in the schedule to the act: (Sect. 41.) Holders of mortgages or bonds issued under the act are not entitled to any preference by reason of the priority of their mortgages or bonds, or of the meeting at which they were authorized. For by sect. 42 it is enacted, that:—

*Rights of  
mortgagees.*

"The respective mortgagees shall be entitled one with another to their respective proportions of the tolls, sums and premises comprised in such mortgages, and of the future calls payable by the shareholders, if comprised therein, according to the respective sums in such mortgages mentioned to be advanced by such mortgagees respectively, and to be repaid the sums so advanced, with interest, without any preference one above another, by reason of priority of the date of any such mortgage or of the meeting at which the same was authorized."

And by sect. 44:—

*Rights of  
obligees.*

"That the respective obligees in such bonds shall, proportionally according to the amount of the monies secured thereby, be entitled to be paid, out of the tolls or other property or effects of the company, the respective sums in such bonds mentioned, and thereby intended to be secured, without any preference one above another, by reason of priority of date of any such bond, or of the meeting at which the same was authorized, or otherwise howsoever (*i*).

Although future calls on shares are mortgaged, the company may, nevertheless, receive and apply such calls: (Sect. 43.) A register of mortgages and bonds must be kept by the secretary; and all shareholders, mortgagees, and bond creditors may, at all reasonable times, peruse the same: (Sect. 45.) Mortgages and bond debts may be transferred by deed, and a form is given in the act (*k*) (sect. 46); and the transfer must be registered with the secretary, otherwise the company are not responsible to the transferee (*l*): (Sect. 47.) The

(*h*) See *White v. Carmarthen and Cardigan R. Co.*, 33 L. J., Ch. 93, 96; 1 Hemm. & M. 786; *West of England, &c. Co. v. Ashford*, L. R., 16 Ch. D. 411, in which latter case it was said by Fry, J., that the requirement to state the consideration was for revenue purposes, and directory only.

(*i*) As to the effect of these three words, see *Dorn v. Bacon, &c.*, L. Co., 36 L. J., Ch. 341; L. R., 3 Eq. 511.

(*k*) See vol. II. The transferee must

sue the company in his own name, *Vertus v. East Anglian R. Co.*, 5 Exch. 280; 19 L. J., Ex. 235. When a transfer, made for a special purpose does not give title to a third party, see *Norman v. Reid*, 10 Ir. L. R. 207.

(*l*) See *Doe v. Jones*, 5 Exch. 16. Whether this applies to transfers by act of law, as in cases of bankruptcy, see *Lane v. Smith*, 14 Bear. 40.

interest on mortgages and bonds must be paid in preference to any dividends payable to the shareholders (sect. 48); the interest on any mortgage or bond is not transferable, except by deed duly stamped: (Sect. 49.) By the Stamp Act, 1870 (*m*), there is payable on a transfer of debenture stock or funded debt, for every 100*l.* and also for every fractional part of 100*l.* of the nominal amount transferred, the sum of 2*s.* 6*d.*; and by 34 Vict. c. 4, s. 5. upon a mortgage of any "stock or marketable security for every 5,000*l.* and also for any fractional part of 5,000*l.* of the amount secured," the sum of 10*s.*

Stamp on transfer.

Companies are allowed to compound for the stamp duty on terms similar to those allowed in respect of transfers of shares (*n*). (compensation for stamp duty.)

The company may fix a time in the mortgage or bond for the repayment of the money, and at the period so fixed it becomes payable (*o*): (Sect. 50.) If no time be fixed, either party may give the other six months' notice, provided twelve months have elapsed from the date of the instrument. The mode of giving notice is prescribed in the act: (Sect. 51.) After the expiration of six months' notice, given by the company, all further interest ceases to be payable: (Sect. 52.) The following clause relates to the appointment of a receiver (*p*):—

"Sect. 53. Where by the special act the mortgagees of the company shall be empowered to enforce the payment of the arrears of interest, or the arrears of principal and interest, due on such mortgages, by the appointment of a receiver, then, if within thirty days after the interest accruing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any of the superior courts of law or equity, require the appointment of a receiver, by an application to be made as hereinafter provided; and if within six months after the principal money owing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee without prejudice to his right to sue for such principal money, together with all arrears of interest, in any of the superior courts of law or equity, may, if his debt amount to the prescribed sum alone, or if his debt does not amount to the prescribed sum, he may, in conjunction with other mortgagees whose debts being so in arrear, after demand as aforesaid, shall, together with his, amount to the prescribed sum, require the appointment of a receiver, by an application to be made as hereinafter provided."

Appointment of a receiver by two justices.

An application for a receiver must be made to two justices, who, by order, may appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment, until the principal or interest due has been recovered: (Sect. 54.) The books of

(*m*) 33 & 34 Vict. c. 97, and sched. tit. "Conveyance or Transfer."

(*n*) See ante, sect. 4.

(*o*) If the principal be not tendered by the company on the day appointed for payment, interest until the day of payment is recoverable. *Paine v. Great Western R. Co.*, 16 M. & W. 244; 16 L. J.,

Ex. 87.

(*p*) In some special acts, bond creditors, as well as mortgagees, are authorized to apply for a receiver; and in considering cases which arise on this subject, it is important to consider how far the clauses in the special acts override or control the provisions of the Consolidation Act.

7. Mortgages,  
Bonds, &c. in  
nature, &c.

Remedies of spe-  
cialty creditors.

Ejectment will  
not lie.

Bond creditors.

account of the company are at all times open to mortgagees and bond creditors: (Sect. 55) (g.)

Having thus briefly stated the contents of the clauses in the Consolidation Act, 1845, which relate to mortgages and bonds or debentures, we proceed to direct attention to some questions of great importance, which have been discussed in the Courts, relative to the rights and remedies which are available to the creditors of railway companies. The subject embraces the rights of simple contract creditors who may obtain judgments against the company, as well as of specialty creditors—for, as we shall see presently, these two classes of creditors may be brought into collision. It was held, in an early case, on the construction of statutes containing nearly similar provisions to those in 8 & 9 Vict. c. 16, that the lands on which a railway is made do not pass by a mortgage of the undertaking, and the rates, tolls and other sums arising under the said acts, and that a mortgagee was not entitled to maintain ejectment; the Court saying that there was no reason to suppose that the Legislature intended so inconvenient a thing to the public and the company, as obliging the company to part with that property by which their undertaking was carried on (r). And it is now clearly settled that the land of a railway company does not pass to the holders of mortgage debentures made in the form given in the schedule to the Companies Clauses Act, 1845. The "undertaking" pledged in such a mortgage is the going concern created by the act, which cannot be broken up by the mortgagee (s).

With respect to bond creditors, it is to be observed that, by the form of the bond (t), the railway company bind themselves, under the common seal, to pay the obligee a certain sum of money on a day named, and in such cases an action of covenant will lie on the bond (u). So if a mortgage deed stipulates that the money shall be repaid on a certain day, this amounts to a covenant that the sum shall be repaid on that day, and in such cases an action lies to recover the money (v). And where an action at law was brought on a bond given by a pier company, and the condition annexed to the bond contained a reference to the provisions in the special act, to the effect that all the owners of such securities should be equally entitled to a claim or lien on the rents, rates, tolls and profits of the company,

(g) The provisions of the Companies Clauses Act, 1845, with respect to additional capital and debenture stock are noticed, post, s. 11.

(r) *Doe d. Mudd v. St. Helen's R. Co.*, 2 Q. B. 341; N. C., 2 Railw. Cas. 756.

(s) *Gardner v. London, Chatham and Dover R. Co.*, L. R., 2 Ch. 201.

(t) 8 & 9 Vict. c. 16, Sched. D.

(u) *Prie v. Great Western R. Co.*, 16 M. & W. 211. When a bond creditor may examine the books of the company, see *Pugh v. Basingstoke Canal Co.*, 2 B. N. C. 370.

(v) *Hart v. Eastern Union R. Co.*, 7 Exch. 216; aff'd Exch. 116; 22 L. J., Ex. 20.

without any preference or priority, and it was contended that an action was not the proper remedy for enforcing the claim of the obligee, for if he recovered in the action he might issue an *elegit*, and then seize the lands of the company; the Court held that the action would lie (*y*). But the learned judges all intimated that the effect of the statute might be such as to restrain the plaintiff from issuing any execution, at least by *elegit* (*z*).

Where it is clear from the language used in a mortgage that the land on which the railway is made is included, then it is also clear that the rights of a judgment creditor are subordinate to those of the mortgagee, as the judgment creditor can only take the interest of his judgment debtor, and that interest is an equity of redemption only. He therefore takes subject to the mortgages (*n*).

Rights of mortgagee paramount to the rights of judgment creditor.

And so where the mortgage is of rates and tolls, it would seem to be equally clear that the rights of a judgment creditor are subordinate to those of a mortgagee. But there is this difference in the case of a mortgage of rates and tolls, that rates and tolls being incorporeal hereditaments, it is necessary for a mortgagee to enter, in order to prevent the mortgagor or judgment debtor from receiving them, and consequently a judgment creditor might, if the mortgagee were not in possession, take rates and tolls in execution (*b*); but as soon as a mortgagee thinks fit to take possession, the judgment creditor would be dispossessed, and could not take subsequent tolls (*c*).

A mortgagee or bond creditor or debenture holder is not bound to wait till his mortgage bond or debenture is due before taking proceedings in equity, but may, as soon as he has ground for so doing, bring an action to protect his security (*d*).

When mortgagees or bond creditors were driven to equity for relief, the rule before the Judicature Act was, that all the specialty creditors must be made parties to the suit (*e*); but it seems to have been a sufficient compliance with this rule for a mortgagee to file his bill on behalf of himself and all other mortgagees (*g*), and the Rules

Parties.

(*y*) *Bolskow v. Herns Bay Pier Co.*, 1 E. & B. 74.

(*z*) On this point, see *Perkins v. Pritchard*, 13 Sim. 277; 3 Railw. Cas. 95; *Hill v. Manchester & Northwich Co.*, 2 B. & Ad. 511; *Kennell v. Westminster Improvement Commissioners*, 11 Exch. 319. See also *Duncan v. Dixon*, dec. R. Co., 36 L. J., Ch. 311, post, p. 131.

(*a*) *Potts v. Warwick and Birmingham Canal Navigation Co.*, Kay, 112; *Ames v. Trustees of Birkbehead Docks*, 20 Beav. 332. See also *Lord Ormer v. Ellerton*, 1 De G. & J. 94; *Loy v. Matheson*, 29 L. J., Ch. 385; 2 Giff. 71. In *Furn v. Cattham R. Co.*, 25 Beav. 611; 27 L. J., Ch. 771; 27 Beav. 538, a judgment

creditor was held entitled to a charge on the tolls and was appointed receiver, but a sale of the lands was refused.

(*b*) See Rules of the Supreme Court, 1843, Ord. XI.V.

(*c*) *Ames v. Trustees of Birkbehead Docks*, 20 Beav. 312; 21 L. J., Ch. 510.

(*d*) *Loy v. Matheson*, 2 Giff. 71; 29 L. J., Ch. 385; *Elliot v. North Eastern R. Co.*, 10 11 L. C. 333; *Widdly v. Mulhams R. Co.*, 18 W. R. 409.

(*e*) 3 Beav. 22. See also *Dre d. Banks v. Booth*, 2 B. & P. 210; *Lord v. Copper Miners Co.*, 5 De Gex. & Sm. 516.

(*g*) *Fripp v. Chard R. Co.*, 11 Harw. 211, 254. See also *White v. Gurnarthon and Gurdigan R. Co.*, 33 L. J., Ch. 93;



7. *Mortgages, Bonds, Debentures, &c.*

of Court now give ample powers to the Court to admit representative plaintiffs, and to prevent the defeat of an action either by misjoinder or non-joinder of parties (*h*).

On the duty of a receiver.

We have thus seen that actions at law have been maintained against railway companies to recover monies secured by bonds or mortgages; and also that, in cases where the special act authorizes such a proceeding, the bond creditors and mortgagees may recover their debts, by applying to two justices to appoint a receiver under the 54th section of the Companies Clauses Consolidation Act. In addition to this the Chancery Division of the High Court has, independently of statute (*i*), an authority to appoint a receiver (*k*), and by virtue of the Railway Companies Act, 1867, an express authority to appoint a receiver, and, if necessary, a manager (*l*).

Conflicting claims of Sheriff and receiver.  
*Russell v. East Anglian R. Co.*

Before the passing of the above act (which now exempts the rolling stock of a railway company from execution (*m*)), the appointment of a receiver gave rise to questions of a very complicated nature between judgment creditors and the receiver. In *Russell v. East Anglian R. Co.* (*n*), it was held that bond creditors have no specific equitable lien on it is not of the company, but that such effects might be taken in execution at the suit of a judgment creditor in respect of a simple contract debt, notwithstanding the appointment of a receiver; but the circumstances of the case were peculiar, and the case is also an authority that, under ordinary circumstances, the sheriff could not levy while the receiver was in possession. In giving judgment Lord Truro, C., observed:—

*Burt v. British Nation Life Assurance Association*, 1 De G. & J. 168; in which latter case it was held that a director was not a proper person to sue.

(*h*) See Order XVI. rr. 2, 7, 9, 13.

(*i*) *De Winton v. Mayor of Bristol*, 28 L. J., Ch. 598; 28 Beav. 593. The interest of a railway company in its railway is not saleable under 27 & 28 Vict. c. 112, s. 1, on the application of an elegit creditor. Inquiries, however, have been directed, and it seems that superfluous lands are saleable. See *Re Bishop's Watlington R. Co.*, L. R., 2 Ch. 382; *Gardner v. London, Chatham and Dover R. Co.*, L. R., 2 Ch. 385; *Re Hull and Hornsea R. Co.*, L. R., 2 Eq. 262; 35 L. J., Ch. 538. In *Re Cowbridge R. Co.*, 37 L. J., Ch. 306, it was held that where land of a railway company has already been delivered to a judgment creditor, a subsequent judgment creditor cannot present a petition under 27 & 28 Vict. c. 112, but must file a bill to enforce his right. In *Re Calne R. Co.*, L. R., 9

Eq. 658, an order was made, without inquiries, for sale of surplus land to an elegit creditor having a right of pre-emption, under sect. 128 of the Lands Clauses Act, 1845.

(*k*) *Gardner v. London, Chatham and Dover R. Co.*, 36 L. J., Ch. 323; L. R., 2 Ch. 201. In this case, Stuart, V.-C., had appointed a manager, but the Lords Justices discharged the order.

(*l*) 30 & 31 Vict. c. 127, s. 4.

(*m*) *Ib.* This section was made perpetual in 1875 by 38 & 39 Vict. c. 31.

(*n*) 3 *Macc. & G.* 295; 6 Railw. Cas. 501. See also *Fripp v. Chard R. Co.*, 11 Haro. 241; *Potts v. Warwick and Birmingham Canal Navigation R. Co.*, Kay, 142; *Ames v. Trustees of Birkenhead docks*, 20 Beav. 332; *Furness v. Calderham R. Co.*, 25 Beav. 614; 27 L. J., Ch. 771; *Lord Crewe v. Edleston*, 1 De G. & J. 93; *Legg v. Mathieson*, 2 Giff. 71; 29 L. J., Ch. 385; *Defries v. Creed*, 34 L. J., Ch. 607.

"The Act [of 1845] is framed on steps: first of all it begins by the 36th section as to the remedies of creditors generally, not at all referring or limiting its operations to any particular class of creditors: then having dealt with the creditors of the concern generally, and given them a right to levy execution upon the property or effects of the company, also without limitation (and if the argument on the part of the plaintiff be correct, there could be no property and effects of the company which could be properly amenable to an execution), it then comes to the mortgagees and bond creditors, and it gives specific remedies to each of these classes of creditors. The meaning and intention then of the 44th section, I apprehend, was to prevent any argument that the rights and remedies of the bond creditors therein referred to, as having certain particular remedies, were limited to those remedies, and the effect of it was to show that the bond creditors were at liberty to pursue their legal or equitable remedies, if they had any, against the property or effects of the company, in common with all the general creditors of the company, as well as being entitled to any particular remedies which might be given to them in terms. Now, although it may not be very safe to argue upon any particular intent with reference to those clauses, yet it is to be remarked that a remedy given to the general creditors against the property and effects of the company, is inconsistent with the whole property and effects being made subject to a specific equitable lien, on the part of any particular class of creditors. It is obvious also that these companies cannot be carried on without large credit being given, and if so, the Legislature could never have intended to exclude the general body of creditors from all remedy for their debts, by giving a specific lien, on the whole estate and effects of the company, to any particular class of creditors. It is, however, said, that although there may be difficulty in contending that while the property remains in possession of the company, and is being used for the purposes of the company, it may not be dealt with notwithstanding the lien, yet that effect may be given to the plaintiff's construction of the act, by allowing the bond creditors or the mortgage creditors at any particular moment to assert their right, and that their right may be inchoate or in suspense until they have asserted it; but what a fraud it would be upon the general creditors to allow the company to contract largely upon the possession and apparent ownership of property, and then to give to the mortgage or bond creditors the opportunity of asserting their lien, when probably the general creditors had allowed the company to obtain on credit the largest portion of their stock! Such a right is not consistent with the general administration of justice, and with the safety and convenience of a commercial concern, which this to a great extent is."

In 1867 the rights of holders of ordinary debentures issued by a railway company in the form given in Schedule C. of the Companies Clauses Acts, 1845, came under the consideration of the Court of Chancery in four suits instituted against the London, Chatham and Dover Railway Company (a). The debentures purported to assign "the general undertaking of the company as defined by" the special act, "and all the tolls and sums of money arising upon or out of the said general undertaking by virtue of the several acts relating thereto, and all the estate," &c. "of the company in the same." Default was made in payment of the principal money secured by the debentures

Mortgage of undertaking and tolls.  
Surplus land.  
*Gardner v. London, Chatham and Dover R. Co.*

(a) *Gardner v. London, Chatham and Dover R. Co.*, 36 L. J., Ch. 323; L. R., 2 Ch. 201.

7. *Mortgages,  
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Eq. 658, an order was made, without inquiries, for sale of surplus land to an elegit creditor having a right of pre-emption, under sect. 128 of the Lands Clauses Act, 1845.

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(*m*) *Id.* This section was made perpetual in 1875 by 38 & 39 Vict. c. 31.

(*n*) 3 Macn. & G. 225; 6 Railw. Cas. 501. See also *Fripp v. Chard R. Co.*, 11 Hare. 241; *Potts v. Warwick and Birmingham Canal Navigation R. Co.*, Kay, 142; *Amos v. Trustees of Birkenhead Docks*, 20 Beav. 332; *Furness v. Caterham R. Co.*, 25 Beav. 614; 27 L. J., Ch. 771; *Lord Crewe v. Eileston*, 1 De G. & J. 93; *Legg v. Mathieson*, 2 Giff. 71; 29 L. J., Ch. 385; *Defries v. Creed*, 34 L. J., Ch. 607.

"The Act [of 1845] is framed on steps: first of all it begins by the 36th section as to the remedies of creditors generally, not at all referring or limiting its operations to any particular class of creditors: then having dealt with the creditors of the concern generally, and given them a right to levy execution upon the property or effects of the company, also without limitation (and if the argument on the part of the plaintiff be correct, there could be no property and effects of the company which could be properly amenable to an execution), it then comes to the mortgages and bond creditors, and it gives specific remedies to each of those classes of creditors. The meaning and intention then of the 44th section, I apprehend, was to prevent any argument that the rights and remedies of the bond creditors therein referred to, as having certain particular remedies, were limited to those remedies, and the effect of it was to show that the bond creditors were at liberty to pursue their legal or equitable remedies, if they had any, against the property or effects of the company, in common with all the general creditors of the company, as well as being entitled to any particular remedies which might be given to them in terms. Now, although it may not be very safe to argue upon any particular intent with reference to those clauses, yet it is to be remarked that a remedy given to the general creditors against the property and effects of the company, is inconsistent with the whole property and effects being made subject to a specific equitable lien, on the part of any particular class of creditors. It is obvious also that these companies cannot be carried on without large credit being given, and if so, the Legislature could never have intended to exclude the general body of creditors from all remedy for their debts, by giving a specific lien, on the whole estate and effects of the company, to a particular class of creditors. It is, however, said, that although there may be difficulty in contending that while the property remains in possession of the company, and is being used for the purposes of the company, it may not be dealt with notwithstanding the lien, yet that effect may be given to the plaintiff's construction of the act, by allowing the bond creditors or the mortgage creditors at any particular moment to assert their right, and that their right may be inchoate or in suspense until they have asserted it: but what a fraud it would be upon the general creditors to allow the company to contract largely upon the possession and apparent ownership of property, and then to give to the mortgage or bond creditors the opportunity of asserting their lien, when probably the general creditors had allowed the company to obtain on credit the largest portion of their stock! Such a right is not consistent with the general administration of justice, and with the safety and convenience of a commercial concern, which this to a great extent is."

In 1867 the rights of holders of ordinary debentures issued by a railway company in the form given in Schedule C. of the Companies Clauses Acts, 1845, came under the consideration of the Court of Chancery in four suits instituted against the London, Chatham and Dover Railway Company (v). The debentures purported to assign "the general undertaking of the company as defined by" the special act, "and all the tolls and sums of money arising upon or out of the said general undertaking by virtue of the several acts relating thereto, and all the estate," &c. "of the company in the same." Default was made in payment of the principal money secured by the debentures

Mortgage of  
undertaking  
and tolls.  
Surplus land.  
*Gardner v. Lon-  
don, Chatham  
and Dover R. Co.*

(v) *Gardner v. London, Chatham and Dover R. Co.*, 36 L. J., Ch. 323; L. R., 2 Ch. 201.

7. *Mortgages,  
Bonds, Debentures, &c.*

on which the first suit was founded and of the interest upon all the debentures, and the first three suits were for enforcing payment of the amount due. The fourth suit was by the assignees of P. & Co., the contractors to the railway, and the bill alleged that the company was indebted to P. & Co. for works executed, and that the directors had given them a charge upon the surplus lands acquired in carrying out the works called the Metropolitan Extensions and the rents and proceeds of sale of such lands as a security. Stuart, V.-C., appointed a receiver and manager in the first three suits, but declined to do so in the fourth, as one was already appointed. Upon appeal to the Lords Justices the order appointing a manager was at once discharged—and, after time taken to consider, judgment was delivered, and Lord Justice Cairns, after explaining at length why the Court would not appoint a manager (2), even with the consent of the company, proceeded as follows:—

Debentures do  
not charge sur-  
plus lands.  
(*Gardner v. Lon-  
don & North-  
ampton R. Co.*)

“The main question argued before us was, whether a receiver should be appointed of the rents and of the sale proceeds of surplus lands, or, in other words, whether the mortgage debentures of G. and D. affected those rents and proceeds in such a manner as to entitle them to payment out of that specific fund through the medium of the receiver. In considering this question, it is necessary to look in the first place at the form of the debentures. [His Lordship read the debentures.] We have next to ascertain the true character of surplus or superfluous land held by a railway company. Surplus land may arise in one of two ways: it may be land originally taken by the railway company in the belief and expectation that it would be required for their line, or for the stations and works connected with it; or (and this is the origin of by far the greater quantity of surplus land) it may be land which the owner, under the provisions of the Lands Clauses Consolidation Act, has forced the company to buy in order that he may not have a severed part of a tenement or field left on his hands. In either case the company are obliged to resell the land within a limited time, applying the proceeds to the purposes of their act, on pain of the land reverting in the original owner, who, if the land be not in a town, is to have the first option of repurchase. It is obvious from this, that the surplus land is in truth the representative and equivalent of a certain portion of the capital provided by the company for the execution of their works, which has—not for purposes of profit, but for the protection of landowners—been temporarily diverted and invested in land to be again resold, and which is to return to the capital of the company when the object for which it has been diverted has been accomplished. And as regards the interim rents, if any, of surplus land, they would appear to be in the same position as the income arising from capital provided by the company and temporarily invested in any other manner until needed.

“The argument by which the debenture holders maintain their right to a receiver of the proceeds of the surplus lands is, in substance, this: they say they are mortgagees of the undertaking, and of the tolls and sums of money arising out of it or by virtue of the act authorizing it; that all the land taken by the company under its parliamentary powers goes, in the first instance, to form a

(2) See now the Railway Companies Act, 1867, 30 & 31 Vict. c. 127, s. 1 (post, vol. II.), which expressly authorizes the appointment of a manager.

part of the undertaking; that as soon as any land becomes surplus land, it becomes subject at the same time to the parliamentary provision for its resale, but the sale monies are in return subjected to this trust, that they are to be applied for the purposes of the special act, that is, for the purposes of the undertaking; that these monies therefore become and form a part of the undertaking, and therefore of their security, and ought to be preserved and applied for them by this Court.

"It is necessary to observe carefully to what length this argument must go. A railway is made and maintained by means of its capital, by means of its borrowed money, of its land, of its proceeds of sale of surplus land, of its permanent way, of its rolling stock. All of these may be said, in a sense, to be connected with, to be parts of, to make up the undertaking. If a mortgage of the undertaking carries in specie the sale monies of surplus lands, it must equally and on the same principle carry in specie the ordinary land of the company, the capital, the permanent way, the rolling stock, nay, even the very money itself lent on the mortgage. The assignment made by the mortgage debenture is immediate, and is to continue for three years at the least. If the debenture holders are right in their argument, they become immediate assignees in specie of all the ingredients which I have enumerated as going to make up the undertaking, and they might from the first have asserted their rights as mortgagees by taking and impounding, not merely the proceeds of surplus lands, but the capital, the cash balances, the rolling stock, and even their own money advanced.

"Now it is beyond question, that the great object which Parliament has in view when it grants to a railway company its compulsory and extraordinary powers over private property is to secure in return for the public the making and maintaining of a great and complete means of public communication; and yet, according to the necessary consequences of the plaintiffs' argument, the moment the company borrowed money on debentures, it would depend on the will or caprice of the debenture holder whether the railway was made at all.

"I may further observe, that in any sense in which the sale monies of surplus lands can be considered part of or monies arising from the undertaking, calls made and paid subsequent to the debenture must be equally a part of or monies arising from the undertaking. And yet the 38th section of the Companies Clauses Act, 1845, and the form of the mortgage in the schedule, clearly assume that under the words of debentures, such as those now before us, future calls would not pass: and the 43rd section provides that even when future calls are expressly included the company may (unless the contrary is provided) receive the calls and apply them to the purposes of the company.

"The argument again of the debenture holders goes in fact to claim for them the same position as if under the term 'undertaking' they were mortgagees of the whole property and effects of the company; and, indeed, the prayer in the bill of Gardner (No. 2) uses the words 'property belonging to or connected with the undertaking.' Now there is nothing in the Companies Clauses Consolidation Act, 1845, to prevent the company borrowing both on bond and mortgage; and the 44th section provides, that the bondholders 'shall be entitled to be paid out of the tolls or other property or effects of the company;' words which in *Russell v. East Anglian R. Co.*\* were held to mean that the bondholders might obtain a judgment, which under sect. 36 would be executed against the property and effects of the company. But according to the plaintiffs' view the whole of the property and effects of the company, being all parts of the undertaking, would be assigned and mortgaged by the debentures, and thus the right apparently given to the bondholder and judgment creditor would be merely illusory.

\* Page 129.

7. *Mortgages,  
Bonds, Deben-  
tures, &c.*

*Cairns v. Lon-  
don, (North on  
and Dover R. Co.*

"It is perhaps unnecessary to pursue further the consequences of the plaintiff's argument. But it must be evident that if the argument be correct very grave differences of opinion and of interest might arise among the debenture holders. Some might desire to arrest the continuance of the undertaking, and to obtain repayment out of the capital or other monies provided for the works; while others might consider that their most hopeful chance of repayment would be by the expenditure of these monies so as to earn tolls and profits; and it would be difficult in such a case to see any common interest in the body of debenture holders such as would enable one to maintain a suit on behalf of all.

"Undertaking."

"As regards the effect of the word 'undertaking' in these securities, we gain but little information from the definition given in the acts of Parliament. In the two public acts—the Companies Clauses Consolidation Act and the Lands Clauses Consolidation Act—the undertaking is defined to be 'the undertaking or works by the special act authorized to be executed;' and in the private act the object appears to be, not so much to describe what is included in the word 'undertaking,' as to divide by metes and bounds, or otherwise, the various undertakings of the company from each other.

"The object and intention of Parliament, however, in the case of each of these various undertakings, was clearly to create a railway which was to be made and maintained, by which tolls and profits were to be earned, which was to be worked and managed by a company, according to certain rules of management, and under a certain responsibility. The whole of this, when in operation, is the work contemplated by the Legislature; and it is to this that, in my opinion, the name of 'undertaking' is given. Monies are provided for, and various ingredients go to make up the undertaking; but the term 'undertaking' is the proper style, not for the ingredients, but for the completed work; and it is from the completed work that any return of monies or earnings can arise. It is in this sense, in my opinion, that the 'undertaking' is made the subject of a mortgage. Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage, is, in my opinion, made over as a thing complete, or to be completed, as a going concern, with internal and parliamentary powers of management not to be interfered with—as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*,—that is to say, the earnings of the undertaking, must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot, under their mortgages, or as mortgagees, by seizing or calling on this Court to seize the capital or the lands, or the proceeds of sales of land or the stock of the undertaking, either prevent its completion, or reduce it into its original elements when it has been completed."

Meaning of  
charge on  
"undertaking."

After disposing of an argument founded upon the 127th section of the Lands Clauses Consolidation Act, Lord Cairns gave judgment for the discharge of the order which had directed the sale monies of the surplus lands to be paid to the receiver, and proceeded:—

"Although I have arrived at the opinion which I have expressed without hesitation, I cannot avoid feeling regret that securities such as railway debentures, upon which so many millions of money have been invested, should have been left at their creation in a state to admit of so much argument as that which has taken

place in this case, and that their legal operation and extent should come to be defined not at the time when they have been given as security, but after difficulties have arisen as to their repayment" (y).

Since this case was decided, important alterations in the law have been made by the Railway Companies Act, 1867 (r), the provisions of which, along with those of the Railway Companies Securities Act, 1866, will be presently noticed (s).

It may be stated here, however, that by s. 4 of the Act of 1867, which was originally a temporary enactment, but was made perpetual in 1875 by 38 & 39 Vict. c. 31, the engines, carriages, &c., constituting the rolling stock and plant of a railway company, are not, after the railway or any part of it is open for public traffic, liable to be taken in execution. The protection of this enactment extends to every company authorized to make a railway, even though the railway be merely a subordinate part of the undertaking authorized (t), and continues, although the railway be closed for traffic (u). The same enactment provides for the appointment of a receiver or manager on the application of a judgment creditor.

Nor is rolling stock in a mine, &c., liable to distress for rent due by the tenant of the mine, &c., unless it be his own property (v).

### 8. *Illegal Borrowing: Lloyd's Bonds.*

If money is borrowed by companies in a manner unauthorized by their acts of incorporation, the securities have no legal validity (x). In 1844 a Committee of the House of Commons reported that large sums of money had been illegally borrowed by railway companies,

(y) The fourth suit resulted in an interlocutory order for a receiver of the surplus sale monies in favour of the assignees, of the contractors, to whom the company had given a charge upon the surplus lands. In the later case of *Boren v. Brecon, &c. R. Co.*, 36 L. J., Ch. 314, where a receiver had been appointed upon a bill filed by a debenture holder on behalf of himself and all other debenture holders; and subsequently another debenture holder having obtained judgment in an action at law in respect of his debt presented a petition in the cause before the Master for leave to issue execution upon his judgment; Wood, V.-C., held that the petitioner was only entitled to issue execution as a trustee for himself and all other debenture holders entitled to be paid *pari passu* with him, and directed an inquiry whether it would be for the benefit of the debenture holders to have the judgment made available for their benefit. But the authority of this case is very questionable. See per Giffard,

L. J., in *re Potteries, &c. R. Co.*, L. R., 5 Ch. 67; 39 L. J., Ch. 273. As to rights of "existing mortgagees" under a special act, see *Robinson v. Ashburton R. Co.*, 17 W. R. 441. See also *The Imperial Mercantile Credit Association v. Nether and Armagh R. Co.*, 11 R., 2 Eq. 1, reversed, ib. 524; 16 W. R. 335, 1070.

(r) 30 & 31 Vict. c. 127, s. 23 et seq., vol. II.

(s) Post, sect. 9, "The Acts of 1866 and 1867."

(t) *Great Northern R. Co. v. Tichborne*, L. R., 13 Q. B. D. 320; 53 L. J., Q. B. 69; 50 L. T. 186; 32 W. R. 559-61. A.

(u) *Midland Wagon Co. v. Potteries, &c. R. Co.*, L. R., 6 Q. B. D. 36; 50 L. J., Q. B. 6.

(v) 35 & 36 Vict. c. 50, vol. II.

(x) See the preamble to sect. 19, 7 & 8 Vict. c. 85, post, vol. II. As to an action by an assignor of a bond as trustee for the assignee, see *Dickson v. Swansea Vale R. Co.*, L. R., 4 Q. B. 11; 38 L. J., Q. B. 17.

Acts of 1866-7.

Rolling stock cannot be taken in execution.

not liable to distress.

8. *Illegal Borrowing: Lloyd's Bonds.*



8. *Illegal  
Borrowing;  
Lloyd's Bonds.*

Loan-notes.

and that it was expedient that the practice should be discontinued for the future, but that the then existing securities should be confirmed. Accordingly, a statute (7 & 8 Vict. c. 85) passed in that year enacts that any railway company issuing any loan-note, or other negotiable or assignable instrument, otherwise than under the provisions of an act of Parliament, shall, for such offence, forfeit a sum equal to the sum for which the loan-note, or other instrument, purported to be a security (y).

The secretary of every company is also required to keep a register of all such loan-notes, &c.; such register to be open to the inspection of certain interested parties (z).

Lloyd's Bonds.

The custom of Parliament to limit the amount of money which a railway company should be permitted to borrow, and to prescribe the conditions under which their borrowing powers should be exercised, has been easily defeated by the issue of obligations (purporting to be for work done or materials supplied for the purposes of the undertaking), commonly called "Lloyd's Bonds." The holders of these bonds can sue upon them and recover judgment and issue execution against the companies, and are not hampered by the equality clauses contained in the ordinary mortgages and bonds (a). There is no reason to doubt the legal validity of Lloyd's Bonds *when bond fide given* to contractors or others for work actually done, as in fact they are nothing more than an acknowledgment under seal of a debt due for a *bond fide* consideration. And they are, in fact, recognized by statute; for the Regulation of Railways Act, 1868, directs the amount due on "Lloyd's Bond and other obligations not included in the loan capital statement" to be set down in the "general balance-sheet," which every company is bound to prepare and print half-yearly (b). But the power to issue "Lloyd's Bonds" is, no doubt, liable to gross abuse, and the propriety and best mode of limiting such power has accordingly been the subject of grave consideration in Parliament. In 1864 a Select Committee of the House of Lords issued a report upon the subject, and the acts of 1866 and 1867, which will be presently noticed, gave effect to nearly all the recommendations of that report (c). The law, as laid down in the cases next following, would seem to be unaffected by those acts.

(y) 7 & 8 Vict. c. 85, s. 19, vol. II.

(z) 7 & 8 Vict. c. 85, s. 21, vol. II. As to the right of parties who lend money on loan-notes to convert the same into shares, and when time is of the essence of such a contract, see *Campbell v. London and Brighton R. Co.*, 5 Hare, 519; 11 Jur. 651; *Parson v. London and Croydon R. Co.*, 14 Sim. 541.

(a) *In re Cork and Youghal R. Co.*, 1 R. 4 Ch. 743. affirming *Malins v. C.*,

Lloyd's Bonds had a valid claim against the assets of the company so far as the company had had the benefit of the sums of money in respect of which the bonds were given. As to assignment of rolling stock to satisfy a Lloyd's Bond, see *Blackmore v. Futes*, 36 L. J., Ex. 121.

(b) 31 & 32 Vict. c. 119, s. 3, and Sched. I. No. 13.

(c) The report was printed at length in the Appendix of the two last editions.

In one case where a company, having exhausted their borrowing powers under their act of Parliament, and being about to apply to Parliament for additional powers, issued bonds, payable at deferred periods, to contractors in anticipation of powers which they hoped to obtain, Wood, V.-C., held, that they had not done what was illegal or a fraud upon Parliament, although part of the bonds were issued for the purpose of raising money required to be deposited in pursuance of the Standing Orders on an application for a new bill (d).

*White v. Carmarthen and Cardigan R. Co.*

Anticipation of parliamentary powers.

But in another and later case (e), where a company issued Lloyd's Bonds in order to discharge the liability of their chairman upon certain promissory notes signed by him to secure 10,000*l.* borrowed by the company to enable them to meet demands made, and to purchase part of the land required by them, it was held by the Court of Queen's Bench, in an action brought upon one of these bonds, that it was illegal, and that the plaintiff could not recover. The defendants were empowered by their special act to raise a capital of 550,000*l.*, and to raise by mortgage any further sum not exceeding 180,000*l.*, but no part of such further sum was to be raised until the whole of the capital had been subscribed for and one-half paid up. Part only of the capital was subscribed for; but the company determined to borrow 10,000*l.* for the purposes above mentioned. In giving judgment, Crompton, J., said,—

*Chambers v. Manchester and Milford R. Co.*  
Bonds to raise money for purchase of land.

"I take the law to be exactly as it was laid down by Lord Wensleydale, in *South Yorkshire R. and River Don Co. v. Great Northern R. Co.* (f), where he says, 'Generally speaking, all corporations are bound by a covenant under the corporate seal properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his own deed. Contracts with partnerships stand on a different footing. But corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contract, and as much as all the members of a partnership would be by a contract in which all concurred.' That is undoubtedly true of corporations generally, and we shall see how he applies it to corporations created for special purposes. I entirely agree with what Mr. Lush says, that these railway companies are creatures of acts of Parliament, constituted for

(d) *White v. Carmarthen and Cardigan R. Co.*, 33 L. J., Ch. 493; 1 H. & M. 786. In *Rashdall v. Ford*, 35 L. J., Ch. 769; L. R., 2 Eq. 750, Wood, V.-C., held that the plaintiff, who had advanced money on a Lloyd's Bond which the company had no power to issue, had no equity against the directors to recover him. This case was decided on the ground that the misrepresentation was as to a point of law. *Bratlie v. Lord Ebury*, L. R., 7 Ch. 777; 41 L. J., Ch. 804. Where the representation is as to fact, the directors may be made personally liable for misrepresentation or breach of warranty. *Weeks v.*

*Proper*, L. R., 8 C. P. 427; 42 L. J., C. P. 129.

(e) *Chambers v. Manchester and Milford R. Co.*, 33 L. J., Q. B. 268; 5 H. & M. 588, 723. In *Imperial Mercantile Credit Association v. Nether and Armagh R. Co.*, L. R., 2 Eq. 524; 16 W. R. 1070, where holders of Lloyd's Bonds, having obtained judgments and converted these judgments into mortgages under 13 & 14 Vict. c. 29, it was held that the bonds were not charged upon the tolls and fares of the company.

(f) 9 Exch. 55.

*S. Illegal  
Borrowing ;  
Lloyd's Bonds.*

*Hambro v.  
Manchester and  
Milford R. Co.*

specific purposes, and we must look to see how far they are affected by provisions conferring upon them the powers of borrowing money, which they are said to have acted upon in the present case. Lord Wensleydale proceeds :—‘But when a corporation is created by an act of Parliament for particular purposes, with special powers, then indeed another question arises ; their deed, though under their corporate seal, and that regularly affixed, does not bind them if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires* ; that is, that the Legislature intended that such a deed should not be made.’ That seems to me to touch the very question before us, and seems to show that if it appears from the act of Parliament, or by natural inference, that the deed is *ultra vires*, it is one which ought not to be made, and is invalid. The directors of these companies are in the position of special agents, and they have no power to affix the seal of the company to such deeds as are declared by the Legislature to be *ultra vires*, in such sense as having expressed that they are not to be made. I think that the corporation is bound by the seal being affixed to the deed where the directors have power given them so to affix it, but that it is not bound where the Legislature has said that the thing shall not be done. I cannot help agreeing with Mr. Lush, when he says that the Legislature intended that the company should have no borrowing powers except in the limited manner prescribed by their act of Parliament. Our attention has been called to 7 & 8 Vict. c. 85, s. 19” —[His Lordship read the section, and proceeded :]—“This implies that borrowing money in this way by these companies is unlawful, for the loan-note is not to be any security for the loan. Why should it not be such a security, except for the reason that the borrowing is illegal? The only doubt which can exist seems to arise upon the infliction of the penalty, and the act is so drawn that it might be argued that no penalty attaches unless the security is assignable ; but I think that it means, if any loan-notes are issued the penalty attaches. The words of the act, as between borrower and lender, are strong to show that that is so, and that borrowing upon the security of loan-notes, or in any manner except such as is authorized by the act of Parliament, would be illegal. We come then to the special act in the present case, which gives power to the company to borrow 185,000*l.* on mortgage. Now, it is said that this does not touch the power of borrowing money on bond, or by simple contract ; and that, by leaving out all mention of bonds, the Legislature has left to the company a larger power of borrowing money than it has given them of borrowing upon mortgage. Such a construction seems very strange. I agree with Mr. Lush, that the mere natural construction is, that this is an enabling act, giving power to the company which it could not otherwise have possessed, and that the directors cannot borrow money in any other way. And this construction is recognized in the Companies Clauses Consolidation Act, 1845, which, by sect. 38, enacts, that ‘if the company be authorized by the special act to borrow money on mortgage or bond, it shall be lawful for them, subject to the restrictions contained in the special act, to borrow on mortgage or bond such sums of money, &c.,’ which means that the special act was required to enable the company to borrow. The provision in this 8th section, when coupled with 7 & 8 Vict. c. 85, s. 19, impliedly prevents the company from borrowing money in any other way than by mortgage. If they could borrow on bond as they pleased, the provision empowering them to borrow on mortgage would be idle. There is, therefore, a special limited mode of borrowing, and the directors have no other powers. In *Payne v. Mayor of Brecon* (y) the difficulty did not arise, for there was no express power to borrow

money for the particular purposes; and in *White v. Carmarthen and Cardigan R. Co.* (h), the bonds were given for a debt really due to the contractors, and which it might have been very proper to do, for companies may be unable at once to get the money required to pay the contractors, and then these bonds may be given to the contractors to enable them to raise money which is due from the company. It is the same as if the company say to the contractors, We are liable to you for work done, and we give you these bonds by way of payment for the work. In the case which was before the Master of the Rolls, *Troup's case* (i), there was no prohibition against paying in this way, and no illegality. Upon the facts of the present case, it appears that the bonds were sealed for the purpose of borrowing money upon them, in order that the plaintiff might be able to discharge the liabilities which were thrown upon him, and in substance it was the same as issuing a loan-note, and the whole transaction was tainted with illegality, for it was clearly prohibited by the act of Parliament."

The whole series of cases up to 1870 on the subject of Lloyd's Bonds will be found reviewed by Lord O'Hagan in *In re Bagnallstown and Wexford R. Co.* (k). In that case the company, whose borrowing powers were not to arise until a certain portion of their line should be open for traffic, agreed with another railway company that if that company would lend them enough to enable them to complete the requisite portion of the line, they would, when their borrowing powers arose, issue and deliver to that company debentures in repayment. The money was lent, the required portion of the line completed, the contractor's accounts defrayed by the lending company, and debentures for the amount were handed over. It was held that there was nothing illegal in the contract, and that the debentures were valid, to the extent of the sum actually advanced.

In *The Yorkshire Railway Wagon Co. v. The Cornwall Minerals Railway Co.* (l), the defendants, whose borrowing powers were exhausted, sold rolling stock to the plaintiffs for 30,000*l.*, 70 per cent. of its value, and repurchased it on a hiring agreement for five years, with an option of repurchase at a nominal price at the end of the hiring. The hire was calculated at an amount sufficient to repay the 30,000*l.* with interest at 7½ per cent. It was held that this transaction was in fact a borrowing and therefore *ultra vires*, and that the plaintiffs could not recover the arrears of hire, or even be allowed to stand in the place of creditors who had been paid out of the 30,000*l.*

Loan by another company for completion of line.

Borrow money by sale and repurchase on hire of rolling stock.

(h) 33 L. J., Ch. 283.

(i) 29 Beav. 353; and see *Hoar's case*, 30 Beav. 225; *Ulster R. Co. v. Banbridge, Lisburn and Belfast R. Co.*, 1 R., 2 Eq. 190; 16 W. R. 508.

(k) 1 R., 4 Eq. 505. That Lloyd's Bonds may under some circumstances be

good in the hands of a purchaser for value without notice, see *In re South Essex Estuary Co., Ex parte Chorbys*, 1 R., 11 Eq. 157; 40 L. J., Ch. 153, per Mellis, V.-C.

(l) 15 L. T. 746.

9. *Acts of 1866  
and 1867.*

The Railway  
Companies  
Securities Act,  
1866.

Loan capital  
half-yearly  
account.

9. *The Acts of 1866 and 1867.*

In the years 1866 and 1867 important alterations were made in the law relating to securities issued by railway companies by the Railway Companies Securities Act, 1866 (*m*), and the Railway Companies Act, 1867 (*n*). Under sect. 1 of the act of 1866, every railway company (*o*) is bound to keep registered at the office of the registrar of joint stock companies in England the name of a registered officer authorized by them to sign instruments under that act; and (sect. 5), within fourteen days after the end of each half-year, to make an account of their loan capital authorized to be raised and actually raised up to the end of that half-year, specifying certain particulars described in the schedule to the act, which account may (sect. 7) be perused at all reasonable times by persons interested; and (sect. 8) must also, within twenty-one days after the end of each half-year, deposit with the registrar of joint stock companies in England a copy certified and signed by the companies' registered officer as a true copy of their loan capital half-yearly account: (Sect. 8.)

They must also, before being entitled to raise any further loan capital, by whatever name called, deposit with the same registrar a certified statement specifying (*inter alia*) the amounts already borrowed, the amount remaining to be borrowed, and the acts under which loan capital has already been or can be in future raised (s. 10 and Sched. I, Pt. I.). And the 14th section prescribes that—

Declaration by  
directors, &c.,  
on mortgage  
deed and bond.

"There shall be put (by indorsement or otherwise) on every mortgage deed or bond made or given after 21st January, 1867, by a railway company for securing money borrowed by the company, and on every certificate given after that day by a railway company for any sum of debenture stock (*p*) issued by the company, a declaration in the form given in the second schedule to this act (*q*), or to the like effect, as circumstances require. Every such declaration shall be signed by two directors of the company specially authorized and appointed by the board of directors to sign such declarations and by the companies' registered officer."

The Railway  
Companies Act,  
1867.

The priority of statutory mortgagees over judgment and other creditors is established by the 23rd section of the Railway Companies Act, 1867 (*r*), in the following terms:—

(*m*) 29 & 30 Vict. c. 103, vol. II.

(*n*) 30 & 31 Vict. c. 127, vol. II.

(*o*) By the interpretation clause, sect. 2, the term "railway company" includes every company authorized by act of Parliament to raise any loan capital for the construction or working of a railway, or for any purposes connected with the conveyance by such company of traffic on a railway either alone or in conjunction with other purposes.

(*p*) This includes "mortgage preference stock and funded debt, and any stock or shares representing loan capital of a rail-

way company by whatever name called," sect. 2.

(*q*) The particulars required by the scheduled form are:—(1) The statute giving power to borrow; (2) the amount of debt authorized; (3) whether or not the obtaining the certificate of a justice, or of the assent of a meeting of the company, has been made a condition precedent to the exercise of the borrowing power; (4) the date at which such condition has been fulfilled.

(*r*) 30 & 31 Vict. c. 127, s. 23, post, vol. II.

"All money borrowed or to be borrowed by a company on mortgage or bond, or debenture stock, under the provisions of any act authorizing the borrowing thereof, shall have priority against the company, and the property from time to time of the company, over all other claims on account of any debts incurred or engagements entered into by them after 20th August, 1867: provided always, that this priority shall not affect any claim against the company in respect of any rent-charge granted or to be granted by them in pursuance of the Land Clauses Consolidation Act, 1845, or the Land Clauses Consolidation Act Amendment Act, 1860, or in respect of any rent or sum reserved by or payable under any lease granted or made to the company by any person in pursuance of any act relating to the company which is entitled to rank in priority to or *pari passu* with the interest or dividend on the mortgage, bond, or debenture stock; nor shall anything hereinbefore contained affect any claim for land taken, used or occupied by the company for the purposes of the railway, or injuriously affected by the construction thereof, or by the exercise of any power conferred on the company."

Priority of mortgages.

But money borrowed for the purpose of paying off bonds or mortgages, given or made under statutory powers, is, so far as the same is so applied, deemed money borrowed within statutory powers: (Sect. 26.)

Advances to meet debentures falling due.

The Act of 1867 also provides (sect. 4 (f)) that the rolling stock and plant of a railway company may not be taken in execution, and (sect. 6 (u)) that companies unable to meet their engagements may file a "scheme of arrangement" in Chancery, to be assented to by mortgagees, &c., in certain proportions.

### 10. Investments by Trustees.

#### 10. Investments by Trustees.

Where, under the terms of a settlement, the trustees had authority to invest money in any of the public stocks or funds of this kingdom, or on real securities, it was held to be a breach of trust to invest the trust funds in railway debentures. Sir J. Romilly, M.R., on this point, said,—

When it is a breach of trust to lend trust monies on railway securities.

"I cannot consider this a proper investment, or such a one as, under the power in this settlement, ought to have been made. Assuming this to be a real security, it is not sufficient for a trustee to say so, and rely upon that as his defence. It is his duty to consider the nature of the property and the conditions upon which it is held. It might possibly be involved in litigation, or subject to liabilities which may prevent its being an available security; and in this very case the security, under the provisions of the act of Parliament for making the railway, cannot be enforced in the ordinary manner in which real securities are made available. No ejectment can be brought, neither can any foreclosure be obtained. Redemption cannot be demanded for eight years; the security may be sold, but the value is diminished by the enjoyment being made reversionary, and the parties entitled in possession before the time of payment. In all respects, therefore, it was a breach of trust" (x).

(x) In this section, not in the act generally. *Re Cambridge R. Co.*, contra Lord Cairns, L. J., overruling Wood, V.-C., L. R., 3 Ch. 278.

(y) Perpetuated by 38 & 39 Vict. c. 31.

(u) See post, Chap. XV.

(x) *Slant v. Leith*, 21 L. J., Ch. 719; 16 Jur. 303; 15 Beav. 524. See also *Mortimore v. Mortimore*, 23 L. J., Ch. 558; 4 De G. & J. 472.

10. *Investments by Trustees.*

Where, however, executors or trustees find among their testator's property railway mortgages or debenture stock, they are not necessarily bound to realize, or guilty of a breach of trust by omitting to do so (y).

Statutory power to invest in debenture stock.

Modern settlements frequently authorize an investment in the debenture bonds of railway companies, or in such preference or guaranteed stocks as produce an unfluctuating dividend. And it is expressly provided by the Debenture Stock Act, 1871 (z), that trustees empowered to invest trust funds in the mortgages or bonds of a railway company may invest such funds in the debenture stock of a railway company, unless expressly forbidden to do so by the instrument creating the trust. Where there are remaindermen entitled to the capital, an investment in terminable stock at a premium is, of course, improper (a).

11. *Additional Capital.*

Power to convert loan into capital.

C. C. Act, s. 56.

11. *Additional Capital.*

With respect to the conversion of borrowed money into capital, the Companies Clauses Consolidation Act enacts, that, if it be not otherwise provided by the special act, the company may raise the additional sum authorized to be borrowed by creating new shares instead of by borrowing, but such augmentation of capital must be authorized at a general meeting of the company: (Sect. 56.) Such additional capital is subject to the same provisions as to payment of calls, &c., as the original capital, except as to the time and amount of the calls, which may be fixed by the company: (Sect. 57.) If the old shares are at a premium, the new shares must be offered to the shareholders in proportion to their existing shares: (Sect. 58.) The new shares vest in such shareholders, who accept them and pay the instalments due thereon, and if any shareholder fails for one month to accept them, or pay the instalments, the company may dispose of them: (Sect. 59.) If the old shares are not at a premium when the capital is augmented, the company may issue the new shares on such terms as they think fit: (Sect. 60.)

Offer of new shares to existing shareholders, s. 58.

Exercise of option to take new shares.

It appears that the shareholder is held strictly to the exercise of his option within the time limited, and that from the nature of the property which is the subject of the option, time is of the essence of the contract (b). The absence, therefore, of the shareholder from England will not be any excuse for his failing to exercise

(y) *Mortimore v. Mortimore*, *ubi supra*.

(z) 34 & 35 Vict. c. 27, post, vol. II.

(a) See *Stewart v. Sinderson*, L. R., 10 Eq. 26, in which Malins, V.C., disapproved of an investment in certain pre-

ference stocks bearing a high rate of interest, and assumed that some of the stocks were of a terminable character.

(b) *Campbell v. London and Brighton R. Co.* 5 Haro 519

the option within the month (c). But if the new shares be created by an act incorporating Part II. of the Companies (Clauses) Act, 1863, the directors have power to waive the omission of the shareholder, either from absence abroad, or other satisfactory cause, to signify acceptance within the prescribed period (d).

Whether a railway company, authorized by statute to take shares in another company, is entitled to the benefit of an allotment of new shares has not been finally decided. In apparently the only case upon the subject, the Great Western R. Co. were authorized by act of Parliament to subscribe for 17,500 shares in the Metropolitan R. Co. These shares were taken by nominees of the G. W. R. Co. By a subsequent act the M. Co. were authorized to raise additional capital by the creation of new shares. At a general meeting of the M. Co. it was resolved that these shares should be allotted rateably among the holders of original shares. It was held by Wood, V.-C., that neither the G. W. R. Co. nor their nominees were entitled to any new shares, as the G. W. R. Co. had no power to take the shares and would not be liable to call. But the Lords Justices overruled the demurrer, on the ground that the question could not properly be decided at the then stage of the suit, and intimated an opinion that the G. W. R. Co., though not entitled to hold the shares, might be entitled to have them allotted and sold for their benefit (e).

Railway com-  
pany authorized  
to subscribe for  
shares in another  
company, but not  
entitled to have  
them allotted.

The Companies (Clauses) Act, 1863 (f), which applies to all companies obtaining a special act and incorporating Part II. or III. of that act, as the case may be (g), contains some important provisions relating to "additional capital," that is, new ordinary shares or stock, and preference shares or stock; and also relating to "debenture stock," which includes mortgage preference stock, and funded debt (h). And the Railway Companies Act, 1867 (i), also contains several sections altering and amending the act of 1863. The more important of the provisions of the act of 1863 are, that either new shares or new stock may be created with the sanction of three-fifths of the votes of the shareholders at a special meeting (sect. 12); that preference shares are entitled to dividends only out of the profits of each year (sect.

Preference  
stock, &c.  
C. C. Act, 1863.

Debenture  
stock.

(c) *Pearson v. London and Croydon R. Co.*, 14 Sim. 541.

(d) 26 & 27 Vict. c. 118, s. 20, post, vol. II.

(e) *Great Western R. Co. v. Metropolitan R. Co.*, 32 L. J., Ch. 383. The point, which still remains doubtful, can be of importance only where the shares are at a premium.

(f) 26 & 27 Vict. c. 118, s. 12, et seq., vol. II.

(g) Part II., sects. 12—21, deals with preference stock, and Part III., sects. 22—35, with debenture stock.

(h) Sect. 35. For construction of clauses of special acts as to debenture stock, see *Camwall Minerals R. Co.*, L. R., 13 Ch. 11, 314; affirmed sub nom. *Finlay v. Harrison*, L. R., 8 App. Cas. 780. By the Stamp Act, 1870, the stamp duty payable on transfers of debenture stock is 2s. 6d. for every full sum of 100l. and also for any fractional part of 100l. of the nominal amount of stock transferred.

(i) 30 & 31 Vict. c. 127, s. 21, et seq., post, vol. II.



11. *Additional Capital.*

14); that, where the ordinary shares are at a premium, the new stock shall, "unless the company otherwise determine," be offered to existing shareholders at par (sect. 17); and as to debenture stock, that the payment of arrears of interest may be enforced by the appointment of a receiver: (Sect. 25.)

Certificate of Board of Trade authorizing additional capital.

The Railway Companies Powers Act, 1864 (*k*), also contains provisions empowering the Board of Trade (in the case of railway companies incorporated by special act or by certificate under the Railways Construction Facilities Act, 1864 (*l*), to grant a certificate that the company are authorized to raise a capital for the purposes of the certificate such additional sum of money as therein limited by the issue of new shares or new stock, either ordinary or preference or partly ordinary and partly preference, or partly in that mode and partly by borrowing on mortgage, at the option of the company or as may be prescribed in the certificate, and with power to create and issue debenture stock.

Issue of preferred and deferred ordinary stock.

The Regulation of Railways Act, 1868 (*m*), also provides that any company which in the year immediately preceding has paid a dividend on their ordinary stock of not less than three per cent. may, pursuant to the resolution of an extraordinary general meeting, divide their paid-up ordinary stock into preferred ordinary stock and deferred ordinary stock, and issue the same subject to certain provisions and with certain consequences set forth in the act. The principal provisions are, that the preferred stock bears a fixed maximum dividend at the rate of 6 per cent., but that where there are not profits available for payment of such dividend, no part of the deficiency is to be made good out of the profits of any subsequent year: (Sect. 13, sub-sects. 6, 9.)

(*k*) 27 & 28 Vict. c. 120, post, vol. II.  
For the procedure under this act and the amending act of 1870, see post, Ch. X.,

"Jurisdiction of the Board of Trade."  
(*l*) 27 & 28 Vict. c. 121, post, vol. II.  
(*m*) 31 & 32 Vict. c. 119, s. 13, vol. II.

## CHAPTER IV.

## ON THE POWERS TO TAKE OR INJURIOUSLY AFFECT LANDS.

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1. *Agreements made before the Special Act is obtained.*1. *Agreements before the Act.*

WE will first treat of contracts to take lands, entered into by railway companies under their permissive powers, and the subject naturally divides itself into two branches, *i. e.*, first, where the contracts are made before the special act for making the railway is obtained; and, secondly, where they are made afterwards. The first branch has been fruitful of litigation, as we shall see upon an investigation of the authorities.

In the early days of railways it was frequently held, in conformity with a previous decision of Lord Eldon (*a*), that agreements made by landowners with promoters of railway companies to sell their lands, and to withdraw or withhold opposition to a bill in Parliament (*b*), were not illegal, either as being a fraud upon the Legislature or other landowners, or as being contrary to public policy; and landowners recovered from companies large sums of money which had been agreed by promoters to be paid them as the price of their land, with a view to secure the withdrawal of their opposition to such bills (*c*). And it

How far contracts made by promoters are binding on company.

(a) *Vauxhall Bridge Co. v. Spencer*, Jac. 64. See 2 Madd. 356.

(b) In *Poolo v. Poolo*, 34 L. J., Ch. 586; 13 W. R. 648, *Kindersley v. -C.*, held a tenant for life, who had received a large sum of money to withdraw opposition to a railway bill, to be a trustee of it for the benefit of himself and the remaindermen. See also *Earl Shrewsbury v. North Staffordshire R. Co.*, 35 L. J., Ch. 168.

(c) *Stanley v. Chester and Birkenhead R. Co.*, 1 Railw. Cas. 58; 9 Sim. 264; 3

Myl. & Cr. 773; *Lord Petre v. Eastern Counties R. Co.*, 1 Railw. Cas. 462; *Lord Houlton v. Simpson*, 10 A. & E. 820; 3 Railw. Cas. 294; 9 Cl. & Fin. 61; *Doe v. London and Croydon R. Co.*, 1 Railw. Cas. 257; *Cypper v. Earl of Lindsey*, 3 H. L. C. 293; *Hawkes v. Eastern Counties R. Co.*, 7 Railw. Cas. 188; 22 L. J., Ch. 77; 16 Jur. 1051; 3 De G. & Sm. 743; 1 Dr Gex, M. & G. 737; 5 H. L. C. 381; *Earl of Lindsey v. G. A. R. Co.*, 10 Haro. 602; 22 L. J., Ch. 995.

1. Agreements  
before the Act.

Lord Cotten-  
ham's doctrine  
in *Edwards v.  
Grand Junction  
R. Co.*

was also held, that the fact of the landowner being a peer or member of Parliament did not render an agreement for the sale of his land at an exorbitant price the less valid, as such persons have as much right to sell their land for the highest price they can get as other people; though, of course, a substantive agreement by a member of the Legislature to take money for his vote would be illegal (*d*).

Moreover, Lord Cottenham considered, that the company, when established under an act of Parliament, are entitled to all the rights and subject to all the liabilities of the projectors, and ought to be regarded in equity, as the successors and assignees of the projectors; and he more than once held, that the company were so far bound by agreements entered into by the promoters or provisional committee or other agents, previous to or during the progress of the bill through Parliament, that he granted injunctions to restrain companies, when incorporated, from exercising powers acquired through the medium of such agreements, without carrying the whole agreements into effect (*e*). And his decisions were for some time acquiesced in and followed by other judges, and even elicited expressions of approbation in the House of Lords. But doubts have been thrown upon those decisions, which must therefore be considered to be considerably shaken, though they have not hitherto been expressly overruled. These doubts are founded chiefly upon the ground, first, that the company when incorporated are not in fact the successors or assignees of the promoters, but generally consist of shareholders who were neither themselves the promoters, nor in any way connected with the promoters of the act, but became subscribers to the funds of the company after incorporation, upon the faith of the act of Parliament, which makes no allusion to any agreement entered into by the promoters; and to hold such subscribers bound by agreements entered into before the act was passed, and not mentioned in the act, would be a fraud upon them, as well as upon the Legislature and other landowners (as indeed was contended in the early cases): and, secondly, that the carrying out such agreements, by the payment of money out of the funds of the company when incorporated, is a misapplication of the funds of the company, and

(*d*) See the cases of *Lords Petre, Horden and Lindsey*, *ubi supra*. See also *Scottish North Eastern R. Co. v. Stewart*, 3 M'Q. 382.

(*e*) *Edwards v. Grand Junction R. Co.*, 1 Railw. Cas. 173; 1 Myl. & Cr. 650; *Stanley v. Chester and Burkenhead R. Co.*, *ubi supra*; *Lord Petre v. Eastern Counties R. Co.*, 1 Railw. Cas. 463; *G. W. R. Co. v. Birmingham and Oxford Junction R. Co.*, 2 Ph. 597, 605; 17 L. J., Ch. 213;

*Earl of Lindsey v. G. N. R. Co.*, *ubi supra*; *Gooday v. Colchester R. Co.*, 17 Beav. 132; *Eastern Counties R. Co. v. Harrold*, 5 H. L. C. 356, 374—380. Of course a party, intending to require a substituted company to perform a contract made by him with other persons, must lose no time in asserting his rights, or equity will afford him no relief. *Greenhalgh v. Manchester and Birmingham R. Co.*, 1 Railw. Cas. 68; 9 Sim. 416; 3 Myl. & Cr. 724.

*ultra vires*. There is, at any rate, very great weight in these objections, and the only prudent course for a landowner, who is opposing a railway bill, to take, is either to obtain such an agreement as shall be personally binding upon some existing company, or individuals of responsibility (f), or else to try and get a clause recognizing his claim to compensation inserted in the act of Parliament, before he withdraws his opposition: though the insertion of such a clause is unusual. It will not be wise for him to rely on the chance of the company, when incorporated, adopting any agreement into which he may enter with the promoters (g), and even if the company does adopt such an agreement, it may turn out to be *ultra vires* and void. Whether the company is bound by an agreement *intra vires*, or whether such an agreement may be repudiated by the company, is, as has been already said, a question upon which the authorities are conflicting. The arguments in favour of holding the company when incorporated to be bound by agreements entered into by the promoters or provisional committee are stated by Lord Cottenham in *Edwards v. Grand Junction R. Co.* (h); whilst those against holding the company liable are to be found in the judgments of Lord Cranworth in the House of Lords in *Preston v. Liverpool and Manchester Junction R. Co.* (i), and *Caledonian and Dumbartonshire Junction R. Co. v. Magistrates of Helensburgh* (k). They are of so much importance, that no apology is required for inserting them at some length.

Persons entitled by  
of 1844 and 1845.

In *Edwards v. Grand Junction R. Co.*, Lord Cottenham, C., said,—

Rule laid down  
by Lord Cotten-  
ham, C., in *Ed-  
wards v. Grand  
Junction R. Co.*

"The railway company contend that they, being now a corporation, are not bound by anything which may have passed, or by any contract which may have been entered into by the projectors of the company, before the act of incorporation. If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes every year subject to the power of these incorporated companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said that the company cannot be sued upon the contract, and that the agent entered into a personal contract,

(f) As to the personal liability of an agent contracting "on behalf of proposed company," see *Kelner v. Bicker*, L. R., 2 C. P. 171; 36 L. J., C. P. 91, where the agent was held liable. In *Scott v. Lord Ebury*, L. R., 2 C. P. 255; 36 L. J., C. P. 161, the promoters and directors were held personally liable for money advanced by a bank.

(g) See *Leominster Canal Navigation v. Shrewsbury and Hereford R. Co.*, 26 L. J., Ch. 761; 3 K. & J. 651.

(h) 1 Railw. Cas. 173; 1 Myl. & Cr. 650. See also *De Hunt and Cambridge R. Co. v. Stanley*, 32 L. J., Ch. 60.

(i) 5 H. L. C. 605; 25 L. J., Ch. 121.

(k) 2 M. & Q. 391. In *Leominster Canal Navigation v. Shrewsbury and Hereford R. Co.*, *ibi supra*, Wood, V.-C., speaking of this case, said, "That decision has only gone to this extent, that that which the directors could not do after the formation of the company, certainly the provisional directors could not do before, for the purpose of binding the company. You cannot spend by anticipation before the act the money of your shareholders, for purposes for which afterwards you could not spend it, and which any single shareholder would have the option of reclaiming you from doing."

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undertaking to procure from the company, when incorporated, a similar contract. It cannot be denied that the act of the agent was the act of the projectors of the railway; it was, therefore, the agreement of the parties seeking an act of incorporation that, when incorporated, certain acts should be done. The question is not whether there be any binding contract at law, but whether this Court will permit the company to use their powers under the act, in direct opposition to the arrangement made with the trustees before the act, and upon the faith of which they were permitted to obtain such powers. If the company and projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before. They are entitled to all their rights and subject to all their liabilities. If any one individual had projected such a scheme, and in prosecution of it had entered into an arrangement, and then had sold and assigned all his interest in it to another, there could be no legal obligation between those who had dealt with the original projector and such purchaser; but in this Court it would be otherwise. So here, as the company stand in the place of the projectors, they cannot repudiate the arrangement into which such projectors have entered; they cannot exercise the powers given by Parliament to such projectors in their corporate capacity, and at the same time refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld.

“The case of *Eust London Waterworks Co. v. Bailey* (l) was cited to prove that, save in certain excepted cases, the agent of a corporation must, in order to bind the corporation, be authorized by a power of attorney; but it does not therefore follow that corporations are not to be affected by equities, whether created by contract or otherwise, affecting those to whose position they succeed, and affecting rights and property over which they claim to exercise control. What right have the company to meddle with the road at all (m)? The powers under the act give them the right, but before that right was so conferred, it had been agreed that the right should only be used in a particular manner. Can the company exercise the right without regard to such an agreement? I am clearly of opinion that they cannot; and having before expressed my opinion that the contract is sufficiently proved, it follows that the injunction granted by the Vice-Chancellor is, in my opinion, proper, and that this motion to dissolve it must be refused, with costs.

“The case of *Vauxhall Bridge Co. v. Earl Spencer* (n) was cited for the trustees, and it certainly is a strong authority in favour of their claim; Lord Eldon having in that case expressed an opinion that the withdrawing opposition to a bill in Parliament might be a good consideration for a contract, and having recognized the right of an incorporated company to connect itself with a contract made by the projectors of the company before the act of incorporation. On the other hand *Dance v. Girler* (o) was cited for the railway company, but that was an attempt to make a surety liable beyond his contract; and Sir James Mansfield in his judgment in that case relied much upon the want of identity between the society with whom the contract was made and the corporation; and the question there was as to a legal liability, not as to an equitable right.

“It was contended for the railway company, that to enforce this equity would be unjust towards the shareholders of the company, who had no notice of the

(l) 4 Bing. 283.

(m) The great struggle in the case was upon the question whether a bridge to a turnpike-road over a railway should be fifty or thirty feet wide. The agreement was, that it should be the same width as

the turnpike-road, which was fifty feet; whilst the act said it should be not less than fifteen feet wide.

(n) 2 Madd. 356; Jac. 64.

(o) 1 B. & T., N. R. 34.

arrangement. To this two obvious answers may be made: first, that the Court cannot recognize any party interested in the corporation, but must look to the rights and liabilities of the corporation itself (*p*); and secondly, that there is nothing in the effect of the injunction inconsistent with the provisions of the act; for although the act provides that bridges shall not be less than fifteen feet in width, it does not provide that they shall not be made wider. The company might under this act clearly agree that this or any other bridge should be fifty feet wide."

In *Preston v. Liverpool, Manchester, &c. R. Co.*,<sup>1</sup> Lord Cranworth, in allusion to that judgment of Lord Cottenham, said,

L. of Cr.  
Cott. (11)  
12 Cl. &  
13 L. J. 4  
11 L. R. 1

"The process of reasoning whereby Mr. Preston seeks to charge the company is this: He says, 'I entered into a contract with the projector of the company, and consequently I have a right to assume that, by my withdrawing my opposition, they succeeded in inducing the Legislature to constitute this company; and the company therefore comes *in esse contra me*, and must take existence with that burden attached to it, and must fulfil this amongst other contracts.'

"In the able argument which was addressed to us by the learned Solicitor-General, that doctrine was very much questioned, and had it been necessary upon the present occasion fully to make up my mind on the subject, whether that doctrine is correct or not, I should have desired much further time for consideration. I am aware that that is a doctrine which was acted upon by Lord Cottenham; and the Solicitor-General, indeed, endeavoured to explain some of the cases to show that he had not quite gone that length. I confess I think it must be taken, that that doctrine has been acted upon in a great many cases by Lord Cottenham; and it has been acted upon in so many cases, that it would be very inexpedient, off-hand, to say that that doctrine cannot be sustained when one considers how much may have been done upon the faith of it. I must, however, own, that when the subject comes to be closely examined, I think there are objections of the gravest nature to its adoption, objections which do not seem sufficiently to have pressed upon the mind of his lordship. Lord Cottenham acted upon this principle, that the railway company was the successor of the projector, or the assignee, if one may say so, of the projector, and must take existence, subject to the burdens which had been contracted for by those who were the promoters of it, and to whom it owed its existence. It is manifest that that doctrine is open to great objections, for when a company is incorporated by act of Parliament, hundreds, I may say thousands, of persons from all parts of the Kingdom, come and purchase shares upon the faith that the act of Parliament tells them what their liabilities are; and in what position are they placed, when upon looking for their dividend they are told, 'You can have no dividend because contracts to the amount of a million (for it might go to that extent) have been entered into to pay persons sums of money which will come out of your capital, and subject to which obligations you own your existence?' The answer that may be made to that is, 'I have had no notice of that; I see in the act of Parliament, which is my title-deed, that there is no allusion to anything of the sort.'

"Now and then there is on the face of an act of Parliament a stipulation that the lands of Mr. Johnson or Mr. Jackson are not to be taken without such and such stipulations. Of course no complaint can be made when that is found, but I must say that the complaints which may really and seriously be made by persons

(*p*) See also per Lord St. Leonards in *Hackley v. Eastern Counties R. Co.*, 1 He Gess. M. & G. 751, 5 H. L. C. 370, 61 5 H. L. C. 617.

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in respect of their being bound by contracts not apparent upon the face of the act of Parliament are formidable to the last degree. Observe, my lords, to what this doctrine leads. There is that case of Lord Petre, at which everybody starts when he hears it, in which there was a contract entered into by the projectors of a company, that if Lord Petre would withdraw his opposition, they would pay him 120,000*l.* for that which was not worth above 4,000*l.* It may be that some of those who purchased the shares of that company were aware of that contract; but in all probability that was not the case with the majority. If this might be done once, as in the case of Lord Petre, it might have been done with ten other landed proprietors, and there would have been above a million of the capital of the subscribers contracted away from them without any sort of knowledge upon their part, and for purposes quite foreign from those for which they subscribed. I, however, only point out this because there may be considerations which may outweigh those which I have now mentioned, and it may be when the matter comes to be looked into more closely, notwithstanding all those formidable objections, that Lord Cottenham's view of the case is the correct one; at all events, having been acted upon so long, it may be inexpedient hastily to depart from it. If, therefore, this case had turned upon the validity or non-validity of that doctrine, I should have desired of your lordships further time to consider as to the course which was to be taken, but it does not."

His lordship then proceeded to examine the contract in question, and showed that it was conditional on the railway being made, and proceeded to say,—

"I do not hesitate to say that even adopting Lord Cottenham's doctrine, and supposing contracts made by projectors are afterwards to be binding upon companies, still that doctrine cannot apply here; it can only be that contracts which the railway company might lawfully have entered into after the company had been formed, shall be binding if they were entered into by those who might be considered as agents for the company before the company came into corporate existence."

"In another case (r), Lord Campbell stated that a contract like this would have been *ultra vires*. That is very high confirmation of the doctrine I am now declaring; but I cannot hesitate to say, even if Lord Campbell had stated nothing of the sort, that I should have had no possible doubt that it is *ultra vires* of a corporation, established for the purpose of applying the funds of its subscribers in making a railway, to enter into a covenant to pay 5,000*l.* to a person for not opposing them in Parliament. To do so is entirely beyond the powers intended to be conferred, or that ever were conferred, upon the directors of a railway company. I state this because I have no wish to shrink from giving that as my opinion. I go entirely upon the other ground as to the construction of the agreement here."

Again, in *Caledonian and Dumbartonshire Junction R. Co. v. Magistrates of Helensburgh* (s), his lordship said:—

"The important question raised in this case is, whether the appellants can be compelled to perform the engagement entered into by the committee of

Lord Cran-  
worth's judi-  
cament in *Cale-  
donian, &c., R.  
(v. Magistrates  
of Helensburgh)*.

(r) *Eastern Counties R. Co. v. Hawles*,  
5 H. L. C. 356; *Hay v. Arnamarket R.  
Co.* 18 Q. B. 169.

(s) 3 M. & Q. 891. This judgment was  
much considered and very long delayed on  
account of a suggestion that *Preston v.*

management, on behalf of the projected company, before it had actually come into existence.

"On behalf of the respondents it was argued, that, though the agreement in question was not entered into by the appellants themselves, that is, by the railway company, yet it was entered into by a committee of management, formed for the object of obtaining the act of Parliament by which the appellants were afterwards incorporated, and so that on principle as well as on authority the appellants are bound to implement what the committee had so undertaken to do.

"Suppose this question not to be settled by the authority of previous decisions, I cannot think that the proposition thus put forward by the pursuers below can be supported. It proceeds on the ground that the committee of management ought to be treated in the nature of agents for the company which owes its existence to their exertions; and that when the company came into being, it was from its very birth (so to say) bound to fulfil the contracts by which its projectors had stipulated that it should be bound.

"This reasoning rests on the assumption that a railway company, when established by Parliament, is in substance, though not in form, a body succeeding to the rights and coming into the place of the projectors. On no other hypothesis can such a company be bound by engagements to which it was not a party. It therefore becomes necessary to consider whether this is a true view of the relative positions of a company established by the Legislature and of the persons, whether called a committee of management or provisional committee, or a body of projectors, who have applied to and obtained from Parliament the act constituting the company. When such a body apply for an act of incorporation, what they ask for of the Legislature is not an act incorporating and giving powers to those only who are applying—not necessarily even incorporating and giving powers to any of them—but an act incorporating all persons who may be willing to subscribe the specified sums and so to become shareholders in the company. If the Legislature accedes to such an application, the act when passed becomes the charter of the company, prescribing its duties and declaring its rights; and all persons becoming shareholders have a right to consider that they are entitled to all the benefits held out to them by the act, and liable to no obligations beyond those which are there indicated. If this be not the true principle, the Legislature might be making itself ancillary to serious injury. When a capitalist, believing in the probable success of any particular project sanctioned by the Legislature, is satisfied with the terms of incorporation embodied in the act, he reasonably advances his money on the faith of those terms; and if the project turns out a failure he has no right to complain. The speculation was one as to the prudence of which he had the means of judging, and no injustice is done to him if in the result he sustains a loss.

"But surely the case is very different, if behind the terms of incorporation expressed in the act, there are others of which the public have no notice, but which are to be held equally binding on the shareholders as if they had formed part of the charter of incorporation. If such secret or unexpected terms are to be held binding on those who take shares, the result may be ruinous to those who act on the faith of what appears on the face of the legislative incorporation. The principle on which all railway acts, and acts of a similar character, proceed, is to specify the sum to be raised and the shares into which the funds of the company

*Liverpool, &c. R. Co.*, then before the House, might involve similar points; but it did not ultimately do so. Lord Brougham

concurred in Lord Cranworth's judgment, 2 M'Q. 422.



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are to be divided, to incorporate the shareholders, and to prescribe the objects to which the funds are to be applied. It is inconsistent with the policy of such acts to hold that there can be any other terms binding on those who subscribe their money, beyond what appears on the face of the act itself.

"Not only is such a doctrine calculated to occasion injury to shareholders, but it may often be a fraud, or, at all events, a surprise on the Legislature. The statutory powers are given on the faith of the terms apparent on the act itself. It may well be that the additional terms, if communicated to Parliament, would have prevented the passing of the act at all.

"Special terms as to particular cases or particular persons are often made the subject of special clauses, and then neither the Legislature nor any person taking shares can complain. The whole truth is disclosed. The Legislature sanctions the special provision and the shareholder purchases his shares with full notice of the exceptional enactment. I know that it is said to be a common practice, sanctioned by committees of both houses when these bills are before them, not to insist on the insertion of these special and private clauses at the instance of persons alleging grounds for their introduction, if agreements between the promoters and the persons asking for the special clauses are entered into, whereby the promoters engage that the company when incorporated shall give to those who are asking for special enactments the same benefit as if there were clauses in the bills to the effect asked for. That may be. Of the propriety of such a practice I am not bound to say anything. But the question is, what is the effect of such arrangements? Do they bind the future company, or those who enter into the agreement? I need hardly say that the practice of committees cannot alter the law of the land, and I confess I can discover no principle, legal or equitable, whereby such contracts can be held to be obligatory on the company.

"And here I must remark that I cannot accede to the argument that the distinction between the company and those who may previously to its formation have entered into contracts purporting to bind it, is one of a technical nature or calculated to occasion substantial injustice to any one. The suggestion that the distinction is one of a technical nature, proceeds on the fallacy that the company are substantially the same persons as the projectors, only embodied in a new form. This is not so. Probably, though not certainly, the projectors may be among the shareholders, but the great bulk of the shareholders will always be persons who have taken shares on the faith of the act after it had passed or in its progress through Parliament, and who know nothing of what is not apparent on the face of the act.

"In holding that the company is a body different from its projectors in substance as well as in form, I am acting on what is the mere truth, and no injustice can arise to those who have dealt with the projectors, for against them, and all under whose authority they acted, there will be a clear right of action if the company does not fulfil the engagements which they have contracted that it shall perform, and that is surely all which those who have dealt with the projectors can claim as their right. For those reasons I am of opinion that there is no ground for holding that a company is bound by any engagement made by those who obtained its act of incorporation, unless those engagements are embodied in the terms of the act itself.

"It remains, however, to be considered how far this question, whatever may be my opinion of its merits, has been settled by authority. The three cases mainly relied on in support of the doctrine contended for by the respondents, who were pursuers below, namely, that a railway company, after it has obtained its act of incorporation, is bound by the contracts of those by whom the act was obtained,

are those of *Edwards v. Grand Junction R. Co.*, *Stanley v. Chester and Birkenhead R. Co.*, and *Lord Petre v. Eastern Counties R. Co.*"

His lordship then stated the facts and part of Lord Cottenham's judgment (t) in the first of those cases, and proceeded :

"In reasoning on this and other cases decided by Lord Cottenham, it has been contended that his judgments went no further than to decide that if the incorporated company took the benefit of the contracts entered into by third persons with the promoters, they, the company, must at the same time perform the obligations binding the promoters. I cannot reconcile such a supposition either with what fell from him in that case, or with the decision itself. The language which I have quoted seems to me to show clearly that he carried his views much further. He says expressly that the company are entitled to all the right and subject to the liabilities of the projectors. He assumes that the company stand in place of the projectors, and treats the powers of the act as powers given by Parliament to the projectors, and the injunction restrains the company from exercising a power which they possessed independently of any contract with the road trustees, because such an exercise would be at variance with the contract between the trustees and the projectors. The judgment further proceeds upon the assumption that the forbearing to oppose the bill was a consideration moving from the trustees to the company, and not solely to the projectors. It is therefore plain that, according to Lord Cottenham's view of the law, the company, when incorporated, cannot exercise its powers in violation of contracts entered into by the projectors before the incorporation."

His lordship then stated the cases of *Stanley* and *Lord Petre*, and added :—

"In this, as in the other cases, Lord Cottenham clearly considered that the company was bound by the contract of the promoters. Lord Petre's case is a very strong one, because the bill contained a statement that the payment of the 120,000*l.* would so reduce the funds of the company as to make it impossible for them to complete their line, and yet Lord Cottenham considered that Lord Petre had a right as against the company to insist on the contract entered into by the six projectors, although the company refused to confirm it by deed under their seal.

"In one of these cases Lord Cottenham referred to *Fanshell Bridge Co. v. Lord Spencer* (u), as in some degree sustaining his views of the law on this subject."

His lordship stated and examined that case, and proceeded :—

"The result is, that in the three cases to which I have referred, Lord Cottenham acted on the principle that a company incorporated by act of Parliament is, or may be, bound by the previous contracts of those by whom the act of incorporation has been obtained. I have stated my reason for thinking that such a doctrine rests on no sound principle, and may lead, as in Lord Petre's case I think it did lead, to great injustice. And if therefore the case now to be decided was in all respects similar to the three cases I have referred to, what I should have to decide would be, whether I should advise your lordships to adhere to the precedents established by Lord Cottenham on the ground that it is unsafe to act

(t) As given above, p. 148.

(u) 2 Madd. 356; Jac. 64,

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are to be divided, to incorporate the shareholders, and to prescribe the objects to which the funds are to be applied. It is inconsistent with the policy of such acts to hold that there can be any other terms binding on those who subscribe their money, beyond what appears on the face of the act itself.

“Not only is such a doctrine calculated to occasion injury to shareholders, but it may often be a fraud, or, at all events, a surprise on the Legislature. The statutory powers are given on the faith of the terms apparent on the act itself. It may well be that the additional terms, if communicated to Parliament, would have prevented the passing of the act at all.

“Special terms as to particular cases or particular persons are often made the subject of special clauses, and then neither the Legislature nor any person taking shares can complain. The whole truth is disclosed. The Legislature sanctions the special provision and the shareholder purchases his shares with full notice of the exceptional enactment. I know that it is said to be a common practice, sanctioned by committees of both houses when these bills are before them, not to insist on the insertion of these special and private clauses at the instance of persons alleging grounds for their introduction, if agreements between the promoters and the persons asking for the special clauses are entered into, whereby the promoters engage that the company when incorporated shall give to those who are asking for special enactments the same benefit as if there were clauses in the bills to the effect asked for. That may be. Of the propriety of such a practice I am not bound to say anything. But the question is, what is the effect of such arrangements? Do they bind the future company, or those who enter into the agreement? I need hardly say that the practice of committees cannot alter the law of the land, and I confess I can discover no principle, legal or equitable, whereby such contracts can be held to be obligatory on the company.

“And here I must remark that I cannot accede to the argument that the distinction between the company and those who may previously to its formation have entered into contracts purporting to bind it, is one of a technical nature or calculated to occasion substantial injustice to any one. The suggestion that the distinction is one of a technical nature, proceeds on the fallacy that the company are substantially the same persons as the projectors, only embodied in a new form. This is not so. Probably, though not certainly, the projectors may be among the shareholders, but the great bulk of the shareholders will always be persons who have taken shares on the faith of the act after it had passed or in its progress through Parliament, and who know nothing of what is not apparent on the face of the act.

“In holding that the company is a body different from its projectors in substance as well as in form, I am acting on what is the mere truth, and no injustice can arise to those who have dealt with the projectors, for against them, and all under whose authority they acted, there will be a clear right of action if the company does not fulfil the engagements which they have contracted that it shall perform, and that is surely all which those who have dealt with the projectors can claim as their right. For these reasons I am of opinion that there is no ground for holding that a company is bound by any engagement made by those who obtained its act of incorporation, unless those engagements are embodied in the terms of the act itself.

“It remains, however, to be considered how far this question, whatever may be my opinion of its merits, has been settled by authority. The three cases mainly relied on in support of the doctrine contended for by the respondents, who were pursuers below, namely, that a railway company, after it has obtained its act of incorporation, is bound by the contracts of those by whom the act was obtained,

are those of *Edwards v. Grand Junction R. Co.*, *Stanley v. Chester and Birkenhead R. Co.*, and *Lord Petre v. Eastern Counties R. Co.*"

His lordship then stated the facts and part of Lord Cottenham's judgment (t) in the first of those cases, and proceeded :

"In reasoning on this and other cases decided by Lord Cottenham, it has been contended that his judgments went no further than to decide that if the incorporated company took the benefit of the contracts entered into by third persons with the promoters, they, the company, must at the same time perform the obligations binding the promoters. I cannot reconcile such a supposition either with what fell from him in that case, or with the decision itself. The language which I have quoted seems to me to show clearly that he carried his views much further. It says expressly that the company are entitled to all the rights and subject to the liabilities of the projectors. He assumes that the company stand in place of the projectors, and treats the powers of the act as powers given by Parliament to the projectors, and the injunction restrains the company from exercising a power which they possessed independently of any contract with the road trustees, because such an exercise would be at variance with the contract between the trustees and the projectors. The judgment further proceeds upon the assumption that the forbearing to oppose the bill was a consideration moving from the trustees to the company, and not solely to the projectors. It is therefore plain that, according to Lord Cottenham's view of the law, the company, when incorporated, cannot exercise its powers in violation of contracts entered into by the projectors before the incorporation.\*

His lordship then stated the cases of *Stanley* and *Lord Petre*, and added :—

"In this, as in the other cases, Lord Cottenham clearly considered that the company was bound by the contract of the promoters. Lord Petre's case is a very strong one, because the bill contained a statement that the payment of the 120,000*l.* would so reduce the funds of the company as to make it impossible for them to complete their line, and yet Lord Cottenham considered that Lord Petre had a right as against the company to insist on the contract entered into by the six projectors, although the company refused to confirm it by deed under their seal.

"In one of these cases Lord Cottenham referred to *Furnishall Bridge Co. v. Lord Spencer* (u), as in some degree sustaining his views of the law on this subject."

His lordship stated and examined that case, and proceeded :—

"The result is, that in the three cases to which I have referred, Lord Cottenham acted on the principle that a company incorporated by act of Parliament is, or may be, bound by the previous contracts of those by whom the act of incorporation has been obtained. I have stated my reason for thinking that such a doctrine rests on no sound principle, and may lead, as in Lord Petre's case I think it did lead, to great injustice. And if therefore the case now to be decided was in all respects similar to the three cases I have referred to, what I should have to decide would be, whether I should advise your lordships to adhere to the precedents established by Lord Cottenham on the ground that it is unsafe to act

(t) As given above, p. 143.

(u) 2 Madd. 356; Jac. 64.

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against a series of decisions, even though they may appear not to rest on any solid foundation, or to depart from them and to adopt what I consider a just and more correct principle.

"I am, however, relieved from the necessity of coming to any positive decision on this point, because I think the present case is distinguishable from those decided by Lord Cottenham, and so that even if those authorities are to be held binding, still they do not govern the present case.

"In all the cases before Lord Cottenham, the contracts which he held to be binding on the company were contracts to do things warranted by the terms of the incorporation."

His lordship then proceeded to show that in the case before the House, what the projectors had contracted to do was to apply funds, raised under legislative authority for the purpose of the railway, to an object foreign from that of the railway, namely, the construction of a pier and harbour at Helensburgh, and on that ground decided that the company was not liable upon the contract of the proprietors.

Review of decisions by Kindersley, V.-C.

*Earl of Shrewsbury v. N. Staffordshire R. Co.*

In 1865 the question again came before the Court of Chancery, in *The Earl of Shrewsbury v. North Staffordshire R. Co. (a)*, and Kindersley, V.-C., after an elaborate review of the cases just named, and stating that it appeared to him that the contract then before him was *ultra vires* of the company, and therefore it was unnecessary for him to decide the abstract question as to whether the contract of the promoters was binding on the company, said :—

"I think, if I were obliged to decide that question, I should be compelled to take this course, to decide in accordance with the unreversed decisions of Lord Cottenham, although I should do so in the full expectation that my decision would be immediately appealed from and reversed, and made to accord with the opinion that has been expressed by the present Lord Chancellor, Lord Cranworth. That would, however, be a very inconvenient course, for I should be simply deciding in that way for the purpose of having my decision overruled, as I have no doubt it would be. At the same time I confess that if it were necessary for me to decide it, I do not know how I should escape from that horn of a dilemma."

Distinction between contracts prohibited and contracts not binding on shareholders.

*Taylor v. Chichester and Midhurst R. Co.*

On the argument of this last-mentioned case a distinction was raised, though it was unnecessary to decide upon it, as to the difference between contracts being *ultra vires* in the sense of being not binding on dissentient shareholders, and in the sense of being actually prohibited by the Legislature. The distinction, if a sound one, is of considerable importance, and was discussed at some length by Willes, J., and Blackburn, J., in the Exchequer Chamber, in the case of *Taylor v. Chichester and Midhurst R. Co. (y)*.

In that case the defendants proposed to apply to Parliament for an act enabling them to extend their railway, and wishing to buy off the opposition of the plaintiff, a landowner over whose estate the proposed

(a) 35 L. J., Ch. 156 ; L. R., 1 Eq. 593. (y) 36 L. J., Ex. 201 ; L. R., 2 Ex. 356.

railway was to pass, entered into an agreement with him, whereby after providing for the purchase of the land required for a specific sum, they agreed absolutely (and not conditionally on requiring any of his land), to pay him within three months after the passing of the bill the further sum of 2,000*l.* by way of compensation for the annoyance, &c., which had been or might be sustained by him in respect of the sporting upon his estate by the construction of the intended railway. The plaintiff agreed not to oppose the bill. The defendants obtained their act, but did not take any part of the plaintiff's land. Both the old and the new acts contained the usual clauses restricting the application of the funds to be raised to the purposes of the respective acts (*z*). The plaintiff having sued the defendants for the 2,000*l.*, it was held by the majority of the judges in the Exchequer Chamber (*a*), reversing the unanimous decision of the Court of Exchequer (*b*), that the covenant was for the appropriation of the funds of the company to purposes other than those to which under either of the acts they could be applied, and so to purposes in effect prohibited, and was therefore *ultra vires*, and that the covenant could not be the foundation of an action. Willes and Blackburn, JJ., however, held that the contract sued on was not "*malum prohibitum*," and was therefore legal as against the defendants, whatever right a dissentient shareholder might have to relief against it; the breach of trust, if any, committed by the directors being in respect of matters affecting the shareholders only. But the House of Lords (*c*) in unanimously and without hesitation reversing the decision of the Exchequer Chamber and affirming that of the Court of Exchequer (*d*), did not found its decision upon or even notice the distinction, the soundness of which it may be remarked, was expressly called in question by some of the judges who had formed the majority in the Exchequer Chamber (*e*).

Let us now proceed to consider some of the cases which have arisen in the Courts, as to the construction of contracts entered into for the purchase of land before the special act is obtained, and as to the remedies available to the vendors of such land in cases where the contracts have not been carried into effect; first promising that contracts of this nature must of course, in general, be construed and governed by the same rules as other contracts of a similar kind; and that, in general, no proceedings can be taken against the com-

Construction and effect of contracts between promoters and landowners.

(*z*) See also Companies Clauses Act, 1845, s. 65.

(*a*) Keating, J., Mellor, J., Smith, J. and Lush, J.; diss. Willes and Blackburn, JJ.

(*b*) Martin, B., Bramwell, B. and Pigott, B. Pollock, C. B., had not heard

the whole argument, but concurred so far as he heard it; 4 H. & C. 409.

(*c*) Lord Hatherley, L. C., Lord Westbury and Lord Colonsay.

(*d*) L. R., 4 H. L. 628.

(*e*) By Montagu Smith, Keating and Lush, JJ., L. R., 2 Ex. at p. 369.

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pany when incorporated, upon an agreement entered into by the promoters, unless after incorporation the company have in some way ratified and adopted the agreement (*f*).

\* Page 155.

This latter difficulty was got over, in the cases of *Webb* and *Lord James Stuart*,\* by agreement. And in another case, where a landowner withdrew his opposition in Parliament to a railway bill, upon an agreement with the promoters that the company would take his land on certain terms, and after the passing of the act brought an action for breach of the agreement against the promoters, which action was stayed, on the company being made by arrangement defendants to a new action, and suffering judgment by default for the demand: it was held that the company thereby adopted the agreement, whether it would otherwise have been binding on them or not, and that it was not vitiated by one of its terms being that the company should pay the costs of the landowner's opposition to the bill (*g*).

Personal Liability  
of promoters.

Where the contract entered into by the promoters amounts to an absolute agreement on their part, that the company will take and pay for the land if the vendor supports the bill and it passes into a law, then upon the performance of those conditions, the vendor may maintain an action for damages against the promoters, if from any circumstance the company fail to carry out the agreement (*h*).

*Capper v. Earl of  
Lindsey.*

Thus, in *Capper v. Earl of Lindsey* (*i*), which was an action in covenant against promoters, both the House of Lords, on appeal from the Exchequer Chamber, and the judges summoned, were unanimously of the opinion that the plaintiff was entitled to recover.

In that case a landowner, through whose estate a part of a projected railway was to pass, became a party to a deed with the projectors of the railway by which he covenanted to withdraw his opposition to their bill, and to oppose a rival bill; and they covenanted to pay him a certain sum of money, in case their bill should pass within six months from the date of the deed, or to pay him a different sum, if the rival bill should pass within eighteen months from the date of the deed. It was then provided, that, if the bill of these projectors should not be passed within six months from the date of the agreement, either party might put an end to the agreement by a

(*f*) In *Bedford and Cambridge R. Co. v. Stanley*, 32 L. J., Ch. 60, Wood, V.-C., held that the company, by giving notice to treat and taking possession under compulsory powers, had waived an agreement made by the promoters with the landowner, and therefore were not entitled to a decree for specific performance of it.

(*g*) *Williams v. St. George's Harbour Co.*, 2 De G. & J. 547; 24 Beav. 339.

(*h*) *Price v. Greenwood & Webb*, 502. on

L. J., Ex. 218; *Capper v. Earl of Lindsey*, 3 H. L. C. 293.

(*i*) The Court of Exchequer decided that the plea was an answer to the action; 1 Exch. 579. This decision was reversed in the Exchequer Chamber; 2 Exch. 801. The House of Lords confirmed the decision in the Exchequer Chamber; 3 H. L. C. 293. See also *Lindsey v. Great Northern R. Co.*, 22 L. J., Ch. 995; 10 Hare,

notice. The deed then contained a covenant on the part of the projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum, within three months after such amalgamation. The two companies were afterwards amalgamated, but no bill ever passed at the instance of those projectors alone, and they subsequently gave a notice to put an end to the agreement. The action was brought against the projectors on that clause of the deed by which the plaintiff was to receive a sum of money, within three months after the amalgamation of the companies; and the defendants pleaded that their bill had never passed into a law; that at the end of six months they had given notice to put an end to the agreement at which time no part of the line of railway had been made on the estate of the plaintiff, nor had his lands been taken by the amalgamated company. The House of Lords decided, that the right to payment did not depend upon the fact of making a part of the railway of the amalgamated company on the plaintiff's estate, on taking or using or doing any injury to his land, but that the right to it depended simply on the effluxion of three months' time after the passing of the Amalgamation Act, and the plea was consequently held bad; and the judgment of the Court below in favour of the plaintiff was affirmed.

But if it clearly appears from the contract that the vendor is not to be paid the stipulated price, unless the company when incorporated require and actually take the land, then the contract is considered as conditional on the taking of the land; and if, in consequence of the abandonment of the railway from inability to raise the necessary funds or from any other cause the company do not take the land, then neither they nor the promoters who signed the contract are bound to pay the stipulated price, no action is maintainable for it, or for damages for the nonpayment of it, nor will a Court of Equity decree specific performance.

No action lies where contract is conditional on company taking the land.

This was decided in *Gage v. Newmarket R. Co. (j)*. In that case a railway company who were promoting a bill for an extension of their line, which, if made, would pass through the lands of the plaintiff, covenanted, "that in the event of the proposed bill passing in the then session of parliament, the company would, before they should enter upon any part of the plaintiff's lands, pay to him 4,900*l.* purchase-money for any portion, not exceeding forty-three acres, which the company might, under the powers of their act, require and take for the purposes of their undertaking; and that in addition to the purchase-money, the company should pay to the plaintiff, before they should enter upon any part of his land, 7,100*l.*, as land-

*Gage v. Newmarket R. Co.*



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lord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them." The Court decided that the company were not liable to pay either of the above-mentioned sums unless they entered upon some part of the lands. Lord Campbell, C. J., delivered judgment as follows :—

"The question we have to determine is, whether, the company never having entered upon any part of the plaintiff's lands, he is now entitled to sue for these two sums, or either of them? The 4,000*l.* is declared to be the purchase-money for the land to be required and taken; and the only time of payment mentioned is before the company enter upon the land. Therefore, if no land is required or taken, and the company never enter on any part of the land, there seems great difficulty in saying that there has been a breach of covenant in not paying the money. So, the 7,100*l.* is declared to be a compensation for severance of the land taken from the rest of the plaintiff's land, and the same time of payment is defined. But there has been no severance to be compensated, and the time for payment has not arrived. The deed does not bargain for a sum of money to be paid absolutely by the company to the plaintiff, as a consideration for his withdrawing his opposition to the bill, but provides a peculiar mode of estimating the value of the land to be taken, and of the compensation to be made for severance-damage, instead of the modes pointed out by the general acts upon the subject. We, therefore, do not think that the company can be considered as having absolutely covenanted to pay 12,000*l.* to the plaintiff in a reasonable time after the passing of the act. If this deed could bear such a construction, we should have thought it so far *ultra vires* and void."

Specific performance refused.

*Preston v. Liverpool, Manchester, &c., R. Co.*

The case of *Preston v. Liverpool, Manchester, &c., R. Co.* (k), was decided on similar grounds. The plaintiff had agreed with the projectors that he would assent to a railway being made through his property, as laid down in the deposited plans, upon condition that in case the company should in that or any subsequent session obtain an act of incorporation, they should pay him 1,000*l.* for all lands required by them for the due making of the railway, and a further sum of 4,000*l.* for residential injury to the estate; that a tunnel should be made in a particular part of the property, and a passenger station made at a spot indicated. The plaintiff thereupon withdrew his opposition to the bill, and the company obtained an act, and proceeded to survey the plaintiff's land, but subsequently abandoned the project of making the railway. The plaintiff thereupon filed his bill for specific performance of the contract. The Master of the Rolls, however, dismissed it, and the plaintiff appealed to the House of Lords, when the decision of the Master of the Rolls was affirmed,

(k) 1 Sim. N. S. 586; 21 L. J., Ch. 61; 17 Beav. 114; 5 H. L. C. 605. See an extract from the judgment of the House of Lords, ante, p. 145. The cases of *Edinburgh &c. R. Co. v. Philson*

2 M'Q. 514, and *Scottish North Eastern R. Co. v. Stewart*, 3 M'Q. 382, were decided on similar grounds. See also *Eastern Counties R. Co. v. Hawkes*, 5 H. L. C. 359, per Lord Campbell.

on the ground that the contract was conditional on the railway being made, and as it was abandoned the plaintiff was not entitled to specific performance.

Upon similar principles in *Webb v. Direct London and Portsmouth R. Co. (l)*., where the agreement was of a vague and contingent nature, specific performance was refused in equity. In giving judgment Lord Cranworth, L. J., said :—

*Webb v. Direct  
London and  
Portsmouth R. Co.*

“ This is not only a case in which we ought not to interfere, but it is a case in which we should be exactly reversing the order of things, and making the machinery of this Court instrumental in doing injustice if we did interfere, because the only relief we could give would be to decree the payment of 4,500*l*. But here it is admitted, that what the contract amounts to is really this :—a contract to pay 4,500*l*. : to select eight acres of the plaintiff's land, and take it from him ; and for such land and consequential damage to pay the 4,500*l*. Now, what the plaintiff would have to do at law, as I believe, would be to state in his declaration this contract, and to allege as a breach of it on the part of the defendants, that they had not taken the eight acres of land, nor paid the 4,500*l*. The amount of damage to be calculated would then, as I conceive, be a calculation made on the aggregate, what, taking all these circumstances into consideration, will do justice? Whereas the relief that would be afforded in this Court would be positive injustice. It would be giving 4,500*l*. as the purchase-money for that which they have not taken, and which, I believe (for there is reason to think that their parliamentary powers are gone), they never can now take. I do not, however, wish to commit myself on that subject. It may be that they could still take it and re-sell it. At all events, it is one of those cases in which, assuming the instrument to amount to what the plaintiff says it amounts to, a contract to pay 4,500*l*. by way of purchase-money, and compensation for damage to be done to other land, he has the ready means of obtaining complete redress at law, and we think to that redress he ought to be left.”

This case was followed by *Lord James Stuart v. L. and N. W. R. Co. (m)*. In this case the following agreement was entered into in consideration of the withdrawal of an opposition to the company's bill by the Marquis of Bute :—“ Watford and Dunstable Railway.—Heads of agreement for the purchase of the Marquis of Bute's land required by the above railway. As to A. (n), the company were to give 400*l*. an acre for the land required for the railway, and an additional 100*l*. for making a particular road. As to B., which was land laid out for building purposes, and was called ‘ The Seven Acres,’ the company were to give 1,250*l*. an acre for seven acres. As to C., they were to give 400*l*. an acre, for what was required ; and as to D., they were to give 250*l*. per acre ; besides which, they were to pay 1,000*l*.

*Lord James  
Stuart v. London  
and North West-  
ern R. Co.*

(l) 21 L. J., Ch. 387 ; 16 Jur. 323 ; 1 De Gex, M. & G. 521.

(m) 21 L. J., Ch. 450 ; 16 Jyr. 581 ; 1 De Gex, M. & G. 721.

(n) The body of the agreement referred to a map at the end. There were four portions of land comprised in it, distin-

guished therein by the letters A., B., C. and D., which respectively referred to the map. In this case the company were willing to admit an adoption by them of the agreement, which was in fact signed by their agents,

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for depreciation of homesteads, &c.” The agreement then contained the following clause :—“The above prices refer to the quantities of land required for the railway, and to the contents of the roads and several portions which are respectively to be accurately measured.” This agreement having been executed, the opposition to the bill was withdrawn, and the company obtained their act; but subsequently they abandoned the line of the railway over the lands in question, and the plaintiff thereupon, shortly before the compulsory powers of the company would expire, filed a bill for specific performance of the contract. Sir John Romilly, M. R., following the decision of Vice-Chancellor Turner in the last-mentioned case, decreed a specific performance (o), but on appeal this decree was also reversed by the Lords Justices. Lord Justice Cranworth said :—

“The ground on which we proceeded in *Webb's case* was this, that whether it was a contract or not, the circumstances of the case made it such that it was not fit for this Court to interfere by way of specific performance, because these two circumstances conspired : first, that complete relief might be obtained at law, if the parties were entitled to any relief; and secondly, the principle of mutuality wholly failed, for it was impossible for the company to hold the land for their benefit in consideration of the money which they were to pay. Now it appears to me that that principle applies precisely in the same way in this case as it did in that.”

Colourable pay-  
ment to land-  
owner.  
*Earl Shrewsbury  
v. North Stafford-  
shire R. Co.*

In the case of *Earl Shrewsbury v. North Staffordshire R. Co.*, a tenant in tail of land through which a projected railway was to pass, threatening to oppose the bill, the promoters in 1845 entered into an agreement, containing other stipulations, all onerous on them, to pay him 20,000*l.* in the event of the company being incorporated, that sum to be “independent of the ordinary payment for land, severance or other usual compensation,” and to be paid into Court. The project failing in committee was merged in another, the provisional committee of which adopted that agreement and the bill passed. In 1848 a deed of covenant was executed under the company's seal, reciting that the landowner had opposed the bill, and that, “with a view to his countenance and support to the undertaking, and to meet the expense and inconvenience to which he shall be personally subject, the promoters had promised, in the event of the company being incorporated, that, over and above and in addition to the value of the land and the compensation money for damage by severance or otherwise,” they would pay him 20,000*l.*; but it being doubted whether it was lawful for him to retain it to his own use, it had been arranged that the company should retain it and pay interest for it, and he should indemnify them in respect of it, and accordingly the company cove-

nanted to pay the interest, the 20,000*l.* to remain in the hands of the company, they being at liberty, when required, to pay it into Court, and the landowner gave a covenant to indemnify. An agreement of even date relating to the lands taken was mutually abandoned, and deeds to carry out a substituted arrangement prepared, but never executed, under which the company took possession and paid the purchase-moneys into Court. Interest upon the 20,000*l.* was paid up to the death of the landowner (for a short period at a reduced rate), and the company refusing to pay it further, a bill was filed by the next tenant in tail to enforce the agreement, and on his death his successor filed another bill for the same purpose : it was held by Kindersley, V.-C., that the only consideration for the agreement of 1845 was to secure the landowner's countenance and support to the scheme ; that the covenant and agreement of 1848 amounted to no more than an adoption and carrying out of that agreement, which, although not illegal, was *ultra vires* of the company, and could not be enforced against them.

The general grounds upon which equity *will* decree specific performance in these cases is thus stated by Lord St. Leonards in *Eastern Counties R. Co. v. Hawkes* (p) :

Specific performance,  
*Eastern Counties R. Co. v. Hawkes.*

"In cases of contracts binding on railway companies, in the view of equity, the Court goes beyond the law. Now specific performance is the right of every seller as well as of every purchaser, unless it can be displaced. It has been said, but has long since been overruled, that a seller may go to law as he only wants the money, whereas the purchaser wants the estate, but a seller wants the exact sum agreed to be paid to him, and he wants to divest himself legally of the estate, which, after the contract, was no longer vested in him beneficially. This is accomplished by specific performance, whereas at law he would be left with the estate on his hands, and would recover damages only according to the views of a jury. He is entitled to a complete remedy, and if you refuse him a specific performance, you deprive him of that which you accord to the purchaser. Look at the consequence ! Equity, immediately after the contract, considers the purchaser as owner of the estate : he may sell or devise it ; it would descend to his heir ; it is no longer the property of the seller ; on the other hand, the money, the price, belongs to the seller ; he may dispose of it as part of his personal estate, and it would go to his personal representatives as such. Now if you capriciously withhold specific relief, a seller can never be sure what is the nature of his interest ; as, for example, whether the estate will go to his heir, or the price to his next of kin. This rule applies as forcibly to a railway company as to an individual. In my opinion it applies with even more force in a case like this. For when a railway company purchases property, nothing but a specific performance would answer the object of the company, and the Legislature has taken care to ensure that object ; whereas in many purchases it is indifferent to a purchaser whether he obtains the estate or damages. The remedy of a seller in a contract for a sale to a railway company ought to be co-extensive with the remedy of the company."

(p) 5 H. L. C. 376. And see per Wood, V.-C., in *Bedford and Cambridge R. Co. v. Stanley*, 32 L. J., Ch. 62. Inconvenience

to the public is no ground for refusing specific performance. *Raphael v. Thomas Tully R. Co.*, L. R., 2 Ch. 117.

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before the Act.

This case of *Eastern Counties R. Co. v. Hawkes* (q) is the only case in which specific performance of a contract, made by the projectors of a railway company for the purchase of lands, has been decreed *against* the company after the passing of the act. In that case it was granted, although the company declined to enter upon the lands, and in fact abandoned their undertaking altogether. The decision is therefore of great practical importance. This case was argued five times. Twice before Knight Bruce, V.-C., who decreed specific performance of the contract, and overruled exceptions which had been taken to the Master's report on the title; thirdly, upon appeal against that decree, before Lord Truro, C., who resigned the seals before he delivered his judgment (r); fourthly, before Lord St. Leonards, C.; and, lastly, before the House of Lords (s), when the judgment of the Vice-Chancellor was affirmed.

The agreement in question was under the corporate seal of a railway company, who were the promoters of a bill in Parliament, for a branch line from their railway to Spalding, with an extension to form a junction with the Ambergate Railway, and the company thereby agreed, conditionally on the bill passing, to purchase the whole of the plaintiff's lands, of part of which he was owner in fee simple, and of the other part only tenant for life, and to obtain all necessary powers for enabling him to complete the purchase. One-third only of the plaintiff's land was within the limits of deviation, and directly affected by the bill in Parliament. The objects of the agreement were to induce the plaintiff to withdraw his opposition to the bill, and also to enable the company to form, independently of Parliament, by means of a diverging line passing through a part of his lands, not included in the deposited plans, a junction with the Ambergate Railway, in the event of the extension proposed by the company's bill being rejected by Parliament. There was nothing in the agreement or evidence to show that the plaintiff knew of the latter object of the company. The bill passed into an act, with a clause prohibiting the formation of the extension line, but giving the company power to purchase land, not exceeding thirty

(q) 16 Jur. 1051; 7 Railw. Cas. 188; 22 L. J., Ch. 77; 3 De G. & Sm. 718; 1 De Gex, M & G. 737. In *Bedford and Cambridge R. Co. v. Stanley*, 32 L. J., Ch. 80, Wood, V.-C., would have granted specific performance *at the suit* of the company, if they had not taken proceedings to enforce their compulsory powers under act. 85. In *Taylor v. Thacker and Aldhurst R. Co.*, the majority of the judges in the Exchequer Chamber distinguished the case of *Eastern Counties R. Co. v. Hawkes*, whilst the minority regarded it as in point. The House of Lords,

in reversing the judgment of the Exchequer Chamber, both thought *Hawkes' case* to be undistinguishable, and approved its principle.

(r) The defendants declined to be bound by his judgment, which he was prepared to deliver after his resignation. See 7 Railw. Cas. 219; 16 Jur. 1057; 15 & 16 Vict. c. 80, s. 80.

(s) 5 H. L. C. 331. In this case it will be observed that the defendants filled the position of both promoters and incorporated company, and it is rather difficult to say in which character they were held liable.

acres, for extraordinary purposes. The company afterwards abandoned the whole of the proposed undertaking, and declined to perform the contract, whereupon the plaintiff filed his bill, and was held entitled to specific performance. The principle of this decision was approved of, and applied to compensation money, by the House of Lords in the more recent case of *Taylor v. Chichester and Midhurst R. Co.* (t). In that case the defendants were an incorporated company who had promoted an extension bill. The extension line was intended to pass through the property of the plaintiff, who announced his intention to oppose the bill. It was thereupon agreed between the directors of the company and the plaintiff—(1) that if the bill should pass, the company would make the extension line; (2) that in the like event the company would, for 2,000*l.*, buy from the plaintiff twenty acres of land, “which would be required for the construction of the railway;” (3) that the company would, within three months after the passing of the bill, pay the plaintiff 2,000*l.* as compensation for injury to his estate; and (4) that the plaintiff would not farther oppose the bill. The whole agreement was to be void in the event of the bill not passing in the then session. The bill passed, but the extension line was not made, nor was the plaintiff’s land taken. It was held that these circumstances afforded no defence to an action by the plaintiff to recover the compensation money. “The contract,” said Lord Hatherley, C., “was dependent entirely on the passing of the act, and the plaintiff would have a right to contemplate it exactly as if the act had passed, and the agreement had been entered into under its powers;” and with regard to the compensation money, “it did not make the least difference that it would be paid for damage which would never be done, if the land was not taken.” And Lord Westbury added that, under the special act, which was an ordinary extension act, “there was no pretext for talking of a breach of trust or want of powers.”

Extension line.  
Compensation money.

In connection with the subject before us, we may remark, that if an agreement be made to withdraw opposition to a bill, in consideration that the company promoting it should make a branch line for the convenience of the petitioner against the bill, it seems that the company may afterwards apply to Parliament for a bill authorizing the abandonment of the branch line. Lord Cottenham, C., refused to grant an injunction to restrain the application for such a bill, but evidently upon the ground that Parliament has the power of destroying,

Parliament may release contract.

(t) L. R., 4 H. L. 628; 39 L. J., Ex. 217, reversing the judgment of the Exchequer Chamber, L. R., 2 Ex. 356, and affirming that of the Exchequer, 4 H. & C. 409. The case was decided on demurrer to pleas—(1) that the land had not been

taken; (2) that the plaintiff had suffered no annoyance; so that the point raised and decided against the landowner in *Earl Shrewsbury’s case* (ante, p. 156), that the payment was colourable, did not arise.

1. *Agreements before the Act.*

Equity will authorize trustees to appear in Parliament.

Conditions precedent.

Costs of reference.

altering or affecting existing rights, but, nevertheless, always providing compensation to the party whose rights are sought to be affected (*u*). And equity will allow a guardian or other trustee to take steps for opposing the progress of a bill in Parliament, or to enter into negotiations with the promoters, if it is shown that the company propose to take lands in a manner which may be prejudicial to the owner, whose estates are under the care of the Court (*x*).

If a contract contains any stipulation which is a condition precedent to the payment of the money by the company, it must be duly performed (*y*).

The Lands Clauses Act does not apply to agreements for the sale of land made before the special act enabling the lands to be taken. The costs, therefore, of a reference held prospectively cannot be recovered from a company after the passing of the special act (*z*).

2. *Agreements after the Act is obtained.*

Sale by party *sui juris*.  
L. C. Act, s. 6.

Sale by party under disability.  
Sect. 7.

2. *Powers to take and purchase Lands, by Agreements made after the Special Act is obtained.*

By the Lands Clauses Act, 1845 (*a*), s. 6, it is enacted that, subject to the provisions of that and the special act, it shall be lawful for the company to agree with the owners of any lands (*b*), by the special act authorized to be taken, and which shall be required for the purposes of such act, and with all parties having any estate or interest in such lands, or by that or the special act enabled to sell and convey the same, for the absolute purchase of any such lands, or such parts thereof as they shall think proper, and of all estates and interests in such lands, of what kind soever (*c*). And, as many persons are incapacitated from selling their lands, by reason of disabilities of various kinds, the statute proceeds to declare it to be lawful (*d*) for

(*a*) *Hatfield v. North Staffordshire R. Co.*, 2 Mac. & G. 109; 20 L. J., Ch. 82; acc. *McDonnell v. Grand Canal Co.*, 3 Ir. Ch. Rep. 578.

(*x*) *Davis v. Combermere*, 3 Railw. Cas. 506; *Monckypenny v. Monckypenny*, 4 Railw. Cas. 226.

(*y*) *Porcher v. Gardner*, 8 C. B. 461; 19 L. J., C. P. 63.

(*z*) *Culling v. Great Northern R. Co.*, 18 W. R. 120; 21 L. J. 769, reversing *Malins v. C.*

(*u*) 8 & 9 Vict. c. 18, s. 6, vol. II.

(*b*) As to the meaning of the words "owner" and "lands," see sect. 3, vol. II. Where a landowner agreed with a railway company to sell them some land, but died without giving the trustees under his will sufficient powers to complete the contract, whereby a suit in chancery was rendered necessary, it was held

that each party must pay his own costs. *London and South Western R. Co. v. Bridger*, 12 W. R. 948.

(*c*) The plaintiff agreed to sell land to a railway company at a sum to be paid on completion, with interest, company to take possession on making deposit; if from any cause other than the vendor's default the purchase was not completed in six months, interest to be paid. Deposit was made and possession given, but more than three years afterwards the company refused to complete for want of funds. It was held that the plaintiff was not entitled to an order on motion for payment of the balance of the purchase-money. *Fryse v. Cambrian R. Co.*, L. R., 2 Ch. 444.

(*d*) 8 & 9 Vict. c. 18, s. 7, vol. II. See *Governors of the Hospital of St. Thomas v. Charing Cross R. Co.*, 30 L. J., Ch. 395.

all parties being seised, possessed of, or entitled to any such lands, or any estate or interest therein, to sell and convey or release the same to the company, and to enter into all necessary agreements for that purpose, and particularly for all corporations, tenants in tail or for life, married women seised in their own right or entitled to dower, guardians, committees of lunatics and idiots, trustees or feoffees in trust for charitable or other purposes, executors and administrators, and all parties for the time being entitled to the receipt of the rents and profits of any such lands in possession, to sell such lands to the company.

And this power so to sell, &c., may be exercised by all the before-mentioned parties, (other than married women entitled to dower, or lessees for life, or for lives and years, or for years, or for any less interest,) not only on behalf of themselves but also on behalf of every person entitled in reversion, remainder or expectancy after them; and as to married women, guardians and committees, trustees, executors and administrators, to the same extent as the wives and the parties represented by such guardians, trustees, &c., respectively could have exercised the same powers if they had been under no disability: (8 & 9 Vict. c. 18, s. 7, vol. II.)

A company buying from trustees for a married woman absolutely entitled, with notice that such married woman objects to the mode of sale, does not take the land so sold with a good title, and can be restrained from the enjoyment of it (e).

Sale by trustees for married woman absolutely entitled.

A tenant for life before the Settled Land Act, 1882, could not convey under this section without his trustees being joined (f); but by sect. 3 of that act he can make a good title alone, and his trustees need not be and ought not to be joined.

Sale by tenant for life.

It is only the committee of a lunatic who may sell the land of a lunatic; a sale by any other person for the lunatic does not convert the land into personality (g). A charge of an annuity for a lunatic has been released for a government annuity (h).

Sale by committees of lunatics.

Whether the parties entitled be under disability or not, the lands may be conveyed to the company in consideration of an annual rent-charge (i) (sect. 10) secured on the tolls or rates payable to the company, and recoverable by action or distress: (Sect. 11.) And the holder of a rent-charge has been allowed leave to distrain, not-

Rent-charge. Sects. 10, 11.

(e) *Peters v. Lewis and East Grinstead R. Co.*, L. R., 16 Ch. D. 603.

(f) *Lippincott v. Smith*, 29 L. J., Ch. 520.

(g) *Tugwell, In re*, L. R., 27 Ch. D. 309; 63 L. J., Ch. 1006.

(h) *Brewer, In re*, 81 L. T., 466.

(i) The Lands Clauses Act, 1860 (23 &

24 Vict. c. 103), s. 2, post, Vol. II., extends sects. 10 & 11 to parties under disability. See quere, if the two acts together authorize parties under disability to sell partly for a gross sum and partly for a rent-charge. See *Wycombe R. Co. v. Donnington Hospital*, L. R., 1 Ch. 271.



2. *Agreements after the Act is obtained.*

Lands taken for extraordinary purposes.

Corporate lands. Lands on the sea-shore, navigable rivers, &c.

Purchase of land for extraordinary purposes.

withstanding the appointment of a receiver (*k*). The rent-charge is the price of the land, and a first charge on the land conveyed, as being the vendor's lien for unpaid purchase-money (*l*). Consequently a rent-charge has priority over debenture stock (*m*). The powers to sell lands, given by sect. 7, extend to lands which the company may take for extraordinary purposes (*n*): (Sect. 12.) And such lands may be sold by the company, and other lands in lieu thereof be purchased by them: (Sect. 13.) But such subsequent purchases cannot be made from persons under legal disability to sell and convey the same: (Sect. 14.)

Municipal corporations may not, except in certain cases, sell lands, unless with the consent of the Treasury: (Sect. 15.) Nor may the company construct any work on the sea-shore below high-water mark, or on any navigable river, without the consent of the Commissioners of Woods and Forests, and the Lord High Admiral. If such works are constructed, contrary to the provisions of the act, they may be abated at the cost of the company: (8 & 9 Vict. c. 20, s. 17, post, App.) The Railways Clauses Act, 1863 (*o*), contains further provisions for the protection of navigation.

As to the purchase of lands for extraordinary purposes, it is thus enacted, by the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 45:—

"It shall be lawful for the company, in addition to the lands authorized to be compulsorily taken by them under the powers of this or the special act, to contract with any party willing to sell the same, for the purchase of any land adjoining or near to the railway, not exceeding in the whole the prescribed number of acres, for extraordinary purposes; (that is to say).

For the purpose of making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing, and loading or unloading goods or cattle to be conveyed upon the railway, and for the erection of weighing-machines, tollhouses, offices, warehouses and other buildings and conveniences:

For the purpose of making convenient roads or ways to the railway, or any other purpose which may be requisite or convenient for the formation and use of the railway."

This section gives no power to take land compulsorily (*p*).

It was held by North, J., and by the Court of Appeal, that a section of a special act passed in 1837, not materially differing from the above 45th section of the general act of 1845, does not empower a company to create a nuisance upon the land purchased under such section, and

Nuisance by cattle dock.

*Truman v. L. R. & S. C. R. Co.*

(*k*) *Nylon v. Denbigh, Brecon and Corwen R. Co.*, 37 L. J., Ch. 669; L. R., 6 Eq. 14, 488.

(*l*) Per Lord Romilly, M. R., *ib.* at p. 490. See Railway Companies Act, 1867, 30 & 31 Vict. c. 127, s. 4, as to a restriction on the power of distress, and s. 11 as to assent by holders of a rent-charge to a "scheme of arrangement."

(*m*) *Eyton v. Denbigh, &c. R. Co.*, L. R.,

7 Eq. 439; 38 L. J., Ch. 74. The rent-charge is a first charge only upon the land actually sold, and not upon all the lands of the company; *ib.*

(*n*) The special act limits the quantity of land which may be taken for extraordinary purposes.

(*o*) 26 & 27 Vict. c. 92, s. 13 et seq.

(*p*) *Earl Beauchamp v. Great Western R. Co.*, 37 L. J., Ch. 77.

an injunction was granted to restrain a company from using land as a cattle dock, whereby (though without negligence on the part of the company) annoyance was caused to adjoining occupiers by reason of the noise of the cattle (*q*), but the House of Lords was of a contrary opinion.

When the Legislature authorize a company to take lands specially described in their acts, it constitutes them judges whether they will or will not take those lands, provided they act with the bona fide object of using the lands for purposes authorized, and not for collateral purposes (*r*). And although the mere affidavit of the companies' engineer will not be sufficient (*s*), the Court will accept his statement as conclusive as to the quantity of land required, if such statement has a reasonable appearance of accuracy (*t*). Moreover, the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92, s. 8), authorizes the company to take additional land in case the Board of Trade certifies that the public safety requires them to do so.

Company the in-  
selves, judges as  
to what land  
should be taken.

Board of Trade  
certificate.

The company is not entitled to any mines of coal, ironstone, slate or other minerals under any land purchased by them, (except only such part thereof as shall be necessary to be dug or carried away or used in the construction of the works,) unless the same shall have been expressly purchased, and such mines shall be deemed to be excepted out of the conveyances, unless expressly named therein: (8 & 9 Vict. c. 20, s. 77, vol. II.) And the company are not entitled to subjacent and adjacent support (*u*).

Mines lying  
under railway.

It is also enacted, by the 8th section of the Lands Clauses Act, that the power given by the acts (*x*) to enfranchise copyhold lands, &c., and to release lands from any rent-charge or incumbrance, and to agree for the apportionment of any rent, &c., shall extend to every party enabled to sell lands to the company (*y*).

Removal of  
incumbrances  
affecting title  
of lands, &c.

For the purpose, however, of preventing any loss to parties entitled in reversion or remainder, the 9th section of the same act provides, that the purchase-money or compensation in respect of injury to lands belonging to any party under any disability or incapacity, and the compensation to be paid for injury to any "such lands," shall not,

Protection for  
reversions, &c.  
Valuation by  
surveyors.  
L. C. Act, s. 9.

(*q*) *Truman v. L. B. & S. C. R. Co.* (the *Croydon station case*), L. R., 25 Ch. D. 423; 53 L. J., Ch. 209; 50 L. T. 89; per North, J., decided on s. 82 of the Company's Act of 1837, 1 & 2 Vict. c. cxix; aff. in C. A., L. R., 29 Ch. D. 89; reversed by House of Lords, L. R., 11 App. Cas. 45; 55 L. J. Ch. 354; 54 L. T. 250; 34 W. R. 657.

(*r*) *Stockton and Darlington R. Co. v. Brown*, 9 H. L. C. 216.

(*s*) *Flower v. London, Brighton and South Coast R. Co.*, 34 L. J., Ch. 540.

(*t*) *Kemp v. South Eastern R. Co.*, L. R., 7 Ch. 361; 41 L. J., Ch. 404; 26 L. T. 110; 20 W. R. 306.

(*u*) *Great Western R. Co. v. Bennett*, L. R., 2 H. L. 27; 36 L. J., Q. B. 133; 16 L. T. 180; 15 W. R. 617. See the series of sections and cases, post, Chap. V., Sect. 4, "Compensation in respect of Mines."

(*x*) See post, Chap. VIII., Sect. 1, "On the Title to and Conveyance of Lands."

(*y*) As to lunatic annuitant, see *Re Brewer*, 34 L. T. 466.

2. *Agreements after the Act is obtained.*

except where the same shall have been determined by the verdict of a jury, or by arbitration, or by the valuation of a surveyor appointed by two justices, be less than shall be determined by the valuation of two able practical surveyors, one nominated by the company and the other by the other party (z); and if these surveyors cannot agree, then by a third surveyor, to be appointed by two justices. The surveyors must annex to the valuation a declaration in writing of its correctness, which declaration is an essential part of the procedure under the section, in the absence of which specific performance will not be decreed against a party under disability (a); and the purchase-money or compensation is to be deposited in the Bank of England, for the benefit of the parties interested. This 9th section applies to cases where land is only injuriously affected, as well as to cases where it is actually taken (b); and the word "such," the second time it occurs in the section, from which it might be inferred otherwise, is either to be rejected as insensible (c), or must be read as meaning "lands so owned," i.e., by parties under disability (d).

Specific performance of contracts.

Contracts made under the foregoing powers should be under the seal of the company, and it is clear that they may then be enforced in equity, by a decree for specific performance. If the agreement contains a stipulation that convenient communications shall be made with adjoining lands, or other similar provisions, inquiries will be directed to be instituted on these points (e). But if the agreement provides that the price or compensation shall be settled by an arbitrator or otherwise, then it seems that an action for specific performance cannot be maintained until the amount is settled and ascertained (f). Thus where the first and second tenants for life of lands entered into a contract with a railway company to sell them lands at a price to be fixed by arbitration or a jury, and the company entered into possession, and paid a sum of money into the bank, and the first tenant for life died, before the amount of the purchase-money was

(z) The surveyors should meet and consider whether the price is or is not a fair price. *Wycombe R. Co. v. Donnington Hospital, L. R.*, 1 Ch. 268. See also *Baker v. Metropolitan R. Co.*, 31 Beav. 501; 32 L. J., Ch. 7; *Tillett v. Charing Cross R. Co.*, 26 Beav. 419.

(a) *Brilgond Gas Co. v. Lord Dunraven, L. R.*, 31 Ch. D. 219; 58 L. J., Ch. 91; 53 L. T. 714; 34 W. R. 119, per Chitty, J.

(b) *Stone v. Mayor of Yeovil*, 2 C. P. D. 99; 46 L. J., C. P. 137; 36 L. T. 279; 25 W. R. 240—C. A.; aff. 1 C. P. D. 691; 45 L. J., C. P. 657; 31 L. T. 874; 24 W. R. 1078.

(c) *Ib.*; 1 C. P. D. at p. 701, per Brett, J.

(d) *Ib.*; 2 C. P. D. at p. 113, per Bram-

well, J. A.

(e) *Sanderson v. Cockermouth and Workington R. Co.*, 2 H. & T. 327; 19 L. J., Ch. 603. See also *Lytton v. Great Northern R. Co.*, 2 K. & J. 391.

(f) *Milnes v. Gery*, 14 Ves. 400; *Adams v. London and Blackwall R. Co.*, 2 Marn. & Gord. 118; 19 L. J., Ch. 557. Where a company delayed to take possession for two years, a suit for immediate specific performance was dismissed. *Reading v. Great Western R. Co.*, 13 Jur. 144. Where the purchase-money was settled by surveyors, and the company had accepted the title and entered into possession, the M. R., on a bill for specific performance, ordered the money to be paid into court. *Chapple v. London, Chatham and Dover R. Co.*, 34 L. J., Ch. 597.

ascertained, or the means of ascertaining it appointed, it was decided that no decree for specific performance of the contract would lie against the company (*g*).



### 3. *The compulsory Powers: Their Commencement and Duration.*

It is incumbent upon a company, seeking to exercise compulsory powers, to prove clearly and distinctly from the act of Parliament the existence of the power which they claim a right to exercise; and if there is any doubt with regard to the extent of the power claimed, that doubt will be solved for the benefit of the landowner, and not in a manner to give to the company any power not most clearly and expressly defined by the statute (*h*). Compulsory powers must, of course, be exercised for the sole purpose of constructing the railway (*i*). And any company authorized by the Legislature to take compulsorily the land of another for a definite object will, if it attempts to take it for any other object, be restrained by injunction from so doing (*k*). But if the land be sought for some object which is clearly within the compulsory powers, the company will not be restrained from taking it merely because the same object might be obtained in some other way without taking the land (*l*).

A contract by a company not to exercise the compulsory powers is void (*m*).

By the 16th section of the Lands Clauses Act, 1845 (*n*), the compulsory powers for taking land cannot be put in force, unless the whole of the estimated capital of the company has been subscribed under contract binding the parties thereto; but though it is a good return to a mandamus to complete the railway (if a mandamus lies), that the capital has not been subscribed (*o*), it is no answer to an action against the company for not issuing their warrant for the assessment of compensation for land which they have given notice of their intention to purchase (*p*). This section does not apply to the taking

#### 3. *Compulsory Powers.*

Omits an company to prove powers.

Contract not to exercise powers void.

Compulsory powers do not commence until capital subscribed.

L. G. Act, s. 16.

(*g*) *Morgan v. Milman*, 17 Jur. 193, Ch. 134; 3 De Gez. M. & G. 21, affirming the decision of Turner, V.-C., 16 Jur. 755; 10 Hare, 279. It is otherwise where a notice to treat has been given and been followed by an award of purchase-money. See *Mason v. Stokes Bay Pier and R. Co.*, 32 L. J., Ch. 110. As to particular stipulations in consideration of withdrawing opposition to the bill, see ante, Chap. II., Sect. 6, "Particular Contracts."

(*h*) *Simpson v. South Staffordshire Waterworks Co.*, 34 L. J., Ch. 380.

(*i*) *Dodd v. Salisbury and Yeovil R. Co.*, 1 Giff. 158.

(*k*) *Galloway v. Mayor of London*, 35

L. J., Ch. 477; L. R., 1 H. L. 31.

(*l*) *Lamb v. North London R. Co.*, L. R., 4 Ch. 522.

(*m*) *Ayr Harbour Trustees v. Oswald*, L. R., 8 App. Cas. 623, per Lord Blackburn, citing *Staffordshire Canal v. Birmingham Canal*, L. R., 1 H. L. 254, and *Mulliner v. Millant R. Co.*, L. R., 11 Ch. D. 611.

(*n*) 8 & 9 Vict. c. 18.

(*o*) *R. v. Ambergate R. Co.*, 1 E. & B. 372; 22 L. J., Q. B. 191.

(*p*) *Hurst v. Poole and Bournemouth R. Co.*, L. R., 5 C. P. 553; 30 L. J., C. P. 329; 22 L. T. 589; 18 W. R. 536.

### 3. Compulsory Powers.

Compulsory powers cannot be exercised after a period prescribed.  
Sect. 128.

of easements, such as the construction of a crossing over another company's line (*g*); and it has been held by North, J., that neither giving notice to treat (as to which see sect. 5 of this chapter), nor entry under sect. 85 of the Lands Clauses Act (as to which see sect. 7 of this chapter) is an exercise of the compulsory powers within the meaning of the section (*r*). By the 17th section a certificate from two justices, that the whole of the capital has been subscribed, is sufficient evidence thereof. Such a certificate is conclusive evidence, in the absence of fraud (*s*).

By the 123rd. section, the powers for compulsory purchase or taking of lands may not be exercised after the prescribed period; and if no period be prescribed, not after the expiration of three years from the passing of the special act (*t*).

It has more than once been argued that as a company is by its special act limited in time for completing their works, then if they sleep upon their works, when the time for completion is come, they should be held disabled from going on with a compulsory purchase. Lord Romilly, M. R., laid down such a rule (*u*), but Lord Cairns, C., declined to do so, although of opinion that it might be very beneficial (*x*). Companies, however, are bound to complete their contracts within a reasonable time, and what is reasonable will depend upon all the circumstances of the case.

The important question whether, in cases where the company have given a notice that lands are required, and the owner, *before* the expiration of the prescribed period, has duly intimated his desire that a jury should be summoned, a writ of mandamus would lie, *after* the prescribed period had elapsed, to compel the company to proceed to summon a jury, was decided in the affirmative in *R. v. Birmingham and Oxford Junction R. Co.* (*y*). It was there said

(*g*) *Great Western R. Co. v. Swindon and Cheltenham R. Co.*, L. R., 9 App. Cas. 787; 53 L. J., Ch. 1075; 51 L. T. 798; 32 W. R. 957.

(*r*) *Ford v. Plymouth, &c. R. Co.*, W. N. for Nov. 19th, 1887.

(*s*) *Ystafni Iron Co. v. Neath and Brecon R. Co.*, L. R., 17 Eq. 142; 43 L. J., Ch. 476. See the form of this certificate, vol. II., tit. *Forms*. This section does not apply to a branch railway authorized to be made by an already existing company. *R. v. Great Western R. Co.*, 1 E. & B. 253; *Weld v. South Western R. Co.*, 33 L. J., Ch. 142; 32 Beav. 340.

(*t*) By 5 & 6 Vict. c. 55, s. 15, vol. II., additional land may be taken after the expiration of the prescribed period, for the purpose of giving increased width to embankments and inclination to slopes, or for making approaches to bridges, or doing certain works therein described for the

repair or prevention of accidents. On the certificate of the Board of Trade that the public safety requires additional land for the above purposes, the compulsory powers of taking lands are revived for a limited period as therein mentioned. See also 26 & 27 Vict. c. 92, s. 8, post, vol. II., as to additional land where Board of Trade requires a bridge to be substituted for a level crossing.

(*u*) *Baker v. Metropolitan R. Co.*, 32 L. J., Ch. 7; *Richmond v. North London R. Co.*, 37 L. J., Ch. 273; L. R., 5 Eq. 352.

(*v*) *Richmond v. North London R. Co.*, L. R., 3 Ch. 679.

(*y*) 19 L. J., Q. B. 453, affirmed in error, *Birmingham and Oxford R. Co. v. R.*, 15 Q. B. 684; 20 L. J., Q. B. 304; *Edinburgh and Glasgow R. Co. v. Monklands R. Co.*, 12 Court of Session Cases (2nd series), 1306.

that the limitation does not apply against a landholder in such a case, because a notice to treat is an inchoate purchase, and after that has been given in due time, it is competent for the landowner to compel the completion of the purchase. So where a company had taken possession of lands, under the 85th section of the Lands Clauses Act, before the expiration of the prescribed period, and had paid the proper sum of money into the bank, but took no further steps to ascertain the amount to be paid by them as compensation, or to clothe themselves with the legal title, and all parties remained inactive until the time limited for exercising the compulsory powers had expired,—it was held that, the company having rightfully entered upon the lands before the expiration of the prescribed period, an ejectment could not be maintained against them after that period (s). And it has also been decided, that if the company give a notice that the lands are required, and afterwards, even a day before the compulsory powers expire, comply with the 85th section, neither their powers to purchase, nor their powers to enter upon the lands, are gone by the effluxion of the prescribed period (a). These cases appear to have been decided upon the principle that as soon as the company have given a notice to take land, they have exercised their powers of compulsory purchase, and that all the subsequent steps are not an exercise of the powers of compulsory purchase, but of powers which are intended to carry that purchase into effect (b).

It is sufficient if notice be given that the lands are required before the expiration of the period prescribed.

#### 4. As to taking "Part" of a House, or Portions of Interscoted Land.

4. What may be taken; "Part" of a House.

The same general powers to take lands, which we have mentioned in the last section, apply to cases wherein the company intend to purchase and take them under their compulsory powers, except that lands taken for extraordinary purposes under sect. 45 (c), if they happen to be beyond the limits of deviation, can only be taken by agreement.

We shall hereafter consider in detail what lands may be taken for the purposes of the railway and works, and especially with regard to the power of the company to make deviations from the line laid down on the parliamentary plans; but it may be convenient to refer, in this place, to some clauses in the acts which are of importance.

(c) *Doe d. Armistead v. North Staffordshire R. Co.*, 20 L. J., Q. B. 249; 16 Q. B. 526; *Worsley v. South Devon R. Co.*, 20 L. J., Q. B. 254; 16 Q. B. 530.

(n) *Marquis of Salisbury v. Great North-*

*ern R. Co.*, 21 L. J., Q. B. 185; 16 Jnr. 710; 17 Q. B. 840.

(b) *Sparrow v. Oxford, &c., R. Co.*, 9 Hare, 430.

(c) Ante, sect. 2.

4. *What may be taken; "Part" of a House.*

Part only of a house or manufactory cannot be taken.

8 & 9 Vict. c. 18, s. 92.

And first, it is enacted by sect. 92, that—

"No party shall at any time be required to sell or convey to the company a part only of any house or other building or manufactory, such party being willing and able to sell and convey the whole thereof."

This section applies, although the landowner may have only a leasehold interest (*d*); and although the premises are held under different leases (*e*). And it applies in cases where the railway passes either under the land by means of a tunnel, or over it by means of a bridge (*f*).

"House."

The word "house" will include a shop or public-house or a hospital (*g*). The time, mode and circumstances at or under which the premises came to be a house, &c., at the time of the notice are immaterial (*h*).

"Manufactory."

Manufacture means the production of something new from raw materials, so that a building used for the packing of tea is not a manufactory (*i*). The term manufactory means a manufactory as it stands, with engines and fixtures, and not merely bricks and mortar (*k*).

What is "part" of a house, &c.

Questions have, however, arisen as to what description of premises fall within the above definition of "a part only of any house or other building or manufactory." In one case (*l*), *Wigram, V.-C.*, required a company to take a dwelling-house and the entire premises, where they proposed to take only a privy situate at the end of a garden used with the dwelling-house. In another case (*m*), where the land proposed to be taken was a strip of land, within the walls of premises used as an iron and tin plate manufactory, and over which strip a person had a right of way, but it had been the practice to use the strip as a place of deposit for rubbish and the scoria which came from the furnaces, it was ruled by Lord Cranworth and K. Bruce, L.JJ., that the strip proposed to be taken constituted a part of the manufactory, and that the company must therefore take the whole of the premises.

Wings of almshouse.

*Grosvenor v. Hampstead Junction R. Co.*

In another case (*n*), the trustees of intended almshouses contracted to buy an acre of land, and to build almshouses on a particular plan,

(*d*) *Pulling v. London, Chatham and Dover R. Co.*, 33 L. J., Ch. 505, post, p. 172.

(*e*) *Macgregor v. Metropolitan R. Co.*, 14 L. T. 354.

(*f*) See as to tunnels, *Sparrow v. O. & W. R. Co.*, ubi supra, per Lord Cranworth, L. J.; *Ramsden v. Manchester R. Co.*, 1 Exch. 723; *Falkner v. Somerset and Dorset R. Co.*, L. R., 16 Eq. 458, post, p. 170.

(*g*) See *Richards v. Swansea Improvement, &c. Co.*, 9 Ch. D. at p. 431, and p. 172, post, per James, L. J.

(*h*) *Id.*

(*i*) *Bennington v. Metropolitan Board of Works*, 54 L. T. 837.

(*k*) *Gibson v. Hammersmith R. Co.*, 32 L. J., Ch. 337.

(*l*) *Dakin v. L. and N. W. R. Co.*, 3 De G. & S. 420. See 26 L. J., Ch. 734, n.

(*m*) *Sparrow v. Oxford and Wolverhampton R. Co.*, 2 De Gex, M. & G. 94; 21 L. J., Ch. 731. See also Knight Bruce, V.-C.'s observations in *Barker v. North Staffordshire R. Co.*, 5 Railw. Cas. 411, and those of Lord Cottenham, C., 5 Railw. Cas. 419.

(*n*) *Grosvenor v. Hampstead Junction*

and add wings when they had funds. Before they built any part, a railway company gave them notice of their intention to apply to Parliament for an act. The centre was built, and then the company gave notice of their intention to take part of the land on which one of the wings would be built according to the plan. The trustees had no funds to build wings; but filed a bill against the company for an injunction to restrain them from taking the land unless they took the whole. The line of railway would not come within some few inches of the building already erected. It was held by the Lords Justices, reversing a decision of Wood, V.-C., that although the company did not propose to touch the actual building, they would be taking part of a house, and must be restrained. And K. Bruce, L. J., said,—

"The singular manner in which the 92nd section is worded has certainly given rise to various questions as to the true meaning of the word 'house' contained in that section: whether it is or is not to be considered as used in a more limited sense than that in which the law generally, if not universally, understands it. But I thought that all such questions had been long set at rest, and that for the sake of general convenience, and for the sake of ordinary justice to private proprietors, the word 'house' in that section was to be read in its ordinary and legal sense."

In another case (o), three houses were built upon a plot of land, a portion of which was laid out in gardens for each house; a summer-house and other detached outhouses were also built. It was held, that the gardens were part of the houses to which they were attached, and that the company was bound to purchase the two houses and premises from which parts of the gardens were taken, and to make compensation for any injury sustained in respect of the third house. Upon similar principles it was held (p), that where the governors of an ancient hospital had purchased additional land, on part of which a new wing had been built, and the rest was laid out as a garden for the use of the entire hospital, a railway company was not entitled to take any part of the newly-acquired premises without purchasing the whole hospital.

A small piece of ground situate in front of a public-house had always been occupied with it. On one side it was open to a narrow

Gardens.  
*Cole v. West London and Crystal Palace R. Co.*

*St. Thomas's Hospital v. Charing Cross R. Co.*

*Marron v. London, Chatham and Dover R. Co.*

*R. Co.*, 26 L. J., Ch. 731; 1 De G. & J. 418. See also *Chambers v. London, Chatham and Dover R. Co.*, 8 L. T. 235. In *Binney v. Hammer Smith R. Co.*, 8 L. T. 161, the company were held bound by a verbal agreement of their surveyor to take the whole site of a house.

(o) *Cole v. West London and Crystal Palace R. Co.*, 28 L. J., Ch. 767; 27 Beav. 242. See also *King v. Wycombe R. Co.*, 29 L. J., Ch. 462; 28 Beav. 101, acc.

(p) *St. Thomas's Hospital v. Charing Cross R. Co.*, 1 J. & H. 400; S. C., 30 L. J., Ch. 395. See also *Giles v. London,*

*Chatham and Dover R. Co.*, ib. 603; 1 Dr. & Sm. 406; where a company, having given notice that they should require part of a workshop, were compelled to take the whole premises, and could not take possession of part on paying into Court the value of part under sect. 85. In *Alexander v. West End of London and Crystal Palace R. Co.*, 31 L. J., Ch. 500, it was held that the company could not take part of intended gardens of unfinished houses without taking the whole land intended for gardens and the houses.



4. *What may be taken, "Part" of a House.*

public street, and customers left their horses and carts standing on it whilst they were inside the public-house. A strip immediately in front of the public-house was paved, and formed part of a public footway between two streets. It was held that the piece of ground was "part of a house" (9).

Two and a half acres of land with a cottage built thereon were occupied by a market gardener for the purposes of his trade. The company ran a tunnel under the cottage, severing thereby a portion of the land from the rest. It was held by Lord Selborne, C. (sitting for the M. R.), that the company might be compelled to take the whole cottage, with so much of the land as was used in connection with it, and also the whole of the severed portion of the land, although the tunnel did not interfere with access (9').

In *Richards v. Swansea Improvement and Tramways Co.* the premises were a house in a street, and five cottages in a row running parallel to the street, the yards at the back of the cottages abutting on the back yard and buildings held with the house. The house in the street was used as a dwelling-house and shop, and the buildings behind it as a candle manufactory, candle store, bread store, and provision store. One of the cottages in the row was made a store-house, and used as a back entrance to the street premises. The case, as was said by James, L. J., was clearly within the 92nd section; but while Hale, V.-C., held the premises to be a manufactory, the Court of Appeal held them to be a house, and Brett, L. J., held them to be both.

What is not "part of a house."

But in the following cases it was held that a strip of land held for pleasure only, and on the other side of a road, was not "part of a house" within the meaning of sect. 92.

Meadow land.  
*Ferguson v. London, Brighton &c., R. Co.*

F. was lessee of a house and garden, and of a strip of meadow land separated therefrom by a road originally made for the convenience of himself and the lessees of the adjoining houses, but which road was afterwards thrown open to the public. Each of the other lessees had also a strip of land on the other side of the road. The leases contained covenants restraining the lessees from building on the strips, and the strips were by arrangement all thrown into one piece, and were used by F. and the other lessees in common as cricket and pleasure-ground, the whole being also let to a butcher for grazing purposes. A railway company required this piece of land for the construction of their line. F. insisted that the company, if they took the land, must also take his house and garden, and on their proceed-

SECT. 4.—WHAT MAY BE TAKEN; "PART" OF A HOUSE.

ing to obtain possession under the Lands Clauses Act, filed his bill for an injunction. But the M. R. refused it, considering it doubtful whether the strip of meadow land was "part of a house." On appeal the decree was affirmed by Turner, L. J., dissentiente K. Bruce, L. J. (s).

And a field separated from the garden of a house by a ha-ha, traversed by a gravel walk leading to a coachman's house at the further end thereof, and used occasionally for purposes of pleasure (archery and dancing), though chiefly as pasture for cows, was held by Turner, L. J., (dubitante K. Bruce, L. J.,) *not* to be part of the house within sect. 92 (t); but a paddock surrounded by a hedge behind a garden surrounded by a wall, a gateway in which opened into the paddock, has been held to be part of a house by Bacon, V.-C. (u).

Pasture.  
*Pulling v. I don, Chatham and Dover* 1

Again, it was held by Lord Westbury, L. C., (overruling Wood, V.-C.,) that a dust-contractor's premises were not a "manufactory," and therefore the totshop, or sorting-place, was not part of a manufactory (x).

Totshop.  
*Ridgley v. J. Pullin, Bow of Works.*

The plaintiff was owner and occupier of a house and six acres of meadow land on the west of E. Road, which being insufficient for the use of his family he bought six and a quarter acres on the other side of the road, the nearest point being 120 yards from his entrance-gate. At the nearest point of this land were a cowhouse, loose box, and a cottage occupied by his grooms because he had no accommodation for them on his own side of the road, and he for many years occupied the land for the purpose of feeding the horses and cows requisite for his establishment. It was held by Turner, L. J., affirming Wood, V.-C., (dubitante K. Bruce, L. J.,) that the six and a quarter acres were not part of a house within sect. 92 (y). And it was also held that the word "house" includes all that would pass by a devise of a house (z).

Meadow on side of road  
*Steele v. M. R. Co.*

Two semi-detached villas under one continuous roof have been held by Lord Cairns, C., and James, L. J., reversing Malins, V.-C., to be separate houses, although their party-wall was so ineffective that the pulling down of one villa would render the other uninhabitable, on the ground that for all practicable purposes they were separate

Semi-detached villas.  
*Harrie v. E. Devon R. Co.*

(s) *Fergusson v. London, Brighton and South Coast R. Co.*, 38 L. J., Ch. 29; 8 L. T. 718; 9 L. T. 134; 33 Beav. 103.

(t) *Pulling v. London, Chatham and Dover R. Co.*, 38 L. J., Ch. 505.

(u) *Barnes v. Southsea R. Co.*, L. R., 17 Ch. D. 536 (where see plan); 32 W. R.

(y) *Steele v. Midland R. Co.*, L. R., 1 Ch. 275; 11 L. T. 3. But see *Stiller v. Metropolitan District R. Co.*, L. R., 9 Eq. 432.

(z) See, therefore, *Smith v. Ridgway*, 85 L. J., Ex. 198, in the Exchequer Chamber. As to what passes at common law

4. *What may be taken; "Part" of a House.*

Two houses used as one.

residences (a); but two houses used as one with internal communication for one business have been held to constitute one house (b).

It will have been observed, that the decisions of learned judges upon the meaning of the words "part of a house" have been frequently reversed. It is in fact impossible to frame a definition which will exactly satisfy the 92nd section. All that can be said is, that in case of doubt, the Court is more likely to lean against the company than in their favour, and that the question is one more of fact than of law (c).

Determination by jury of right to take part only.

Modern special acts not unfrequently leave the question whether a company must take part of a house or the whole of it to be determined by a jury, by virtue of the following clause or a similar one:—

Notwithstanding any terms contained in s. 22 of the Land Clauses Act, the company may take a portion of the lands, buildings, and manufactories comprised in the schedule hereto, without being compelled to take the whole, if such portions can in the judgment of the jury, arbitrators, or other authority assessing or determining compensation under the act be severed from such properties without material detriment thereto" (d).

Landowner cannot compel company to take less than whole.

A landowner, part of whose house is taken, cannot under sect. 92 compel the company to take any portion beyond what it requires less than the whole (e).

Description of the premises.

In requiring the whole to be taken, the landowner need not state whether he makes his claim on the ground of the premises being a "house," or a "building," or a "manufactory," he may describe the premises without such particulars, *e.g.*, as "land occupied and used in the business of a merchant and manufacturer" (f), or by metes and bounds, or by sending a plan with his notice (g).

Effect of negotiation for part.

Where a railway company gives notice to treat for *part* of any premises, a landowner does not, by negotiating for sale of *part*, preclude himself from afterwards insisting on his right to compel the company to take the *whole* under sect. 92; and when once he has given his notice in reasonable time, the company cannot take possession (h).

(a) *Harvie v. South Devon R. Co.*, 32 L. T. 1; reversing 31 L. T. 424.

(b) *Siegenberg v. Metropolitan District R. Co.*, 49 L. T. 554; 32 W. R. 333, per Bacon, V.-C.

(c) It has been said that "the result of the cases seems to establish that what is necessary for the convenient use and occupation of the house, but not what is subsidiary to the personal use and enjoyment of the occupier, falls within the statutory meaning of the word 'house.'" Dart on Vendors and Purchasers, vol. i. p. 213, A.D. 1876. By the Metropolitan R. Co. v. ...

"parts of houses" within s. 92 of the Lands Clauses Act.

(d) See *Morrison v. Great Eastern R. Co.*, 58 L. T. 384.

(e) *Pulling v. London, Chatham and Dover R. Co.*, 33 L. J., Ch. 505.

(f) *Richards v. Swansea Improvement Co.*, 9 Ch. D. 425; 33 L. T. 832; 26 W. R. 761—C. A.

(g) *Ib.*, per James, L. J., 9 Ch. D. at p. 433.

(h) *Gardner v. Charing Cross R. Co.*, 31 L. J., Ch. 181; *S. C.*, 2 J. & H. 246. See also *Gibson v. Hammermith R. Co.*, 30 T. R. 927.

#### SECT. 4.—WHAT MAY BE TAKEN; "PART" OF A HOUSE.

If the company proceed to treat for a part only in contravention of sect. 92, the party interested should give the company notice that he requires them to take the whole, their assent to which will constitute the relationship of vendor and purchaser (*i*), but he may not apply for a mandamus to compel them to do so, because in that case the company may abandon their intention, and refuse to take any part of the premises. Nor may a mandamus go, as to that part only of the land in respect of which the notice has been given by the company (*k*).

A mandamus does not if compel the company to take whole.

It is well settled that cases under sect. 92 afford an exception to the general rule, and the company may withdraw their notice (*l*). They may do so even after giving notice of their intention to apply to the Board of Trade, under sect. 36 of the Railway Companies Act, 1867, for the appointment of a surveyor to value the whole of the premises (*m*).

Withdrawal company in counter-not

Where there had been an agreement to sell "part" of a wharf to a company, and the company notwithstanding gave a notice to treat for part, which was followed by a counter-notice in respect of the whole, it was held that the notice to treat given by the company was no waiver of the agreement, and that the counter-notice could not be proceeded upon (*n*). A company entering upon a supposed consent of a tenant which has not been really given can of course be restrained by injunction (*o*).

The Lands Clauses Act also contains the following provisions with respect to small portions of intersected land.

Intersected lands.

By sect. 93, if any lands, not situate in a town (*p*), or built upon, shall be so cut through and divided by the works as to leave, either on both sides or on one side thereof, a less quantity of land than half a statute acre, and if the owner of such small parcel of land require the promoters to purchase the same, along with the other land required by them, they are bound to purchase the same, unless the

(*i*) *Schwinge v. London and Blackwall R. Co.*, 24 L. J., Ch. 405.

(*k*) *R. v. London and South Western R. Co.*, 5 Railw. Cas. 669; 17 L. J., Q. B. 326; 12 Q. B. 775.

(*l*) *King v. Wycombe R. Co.*, 29 L. J., Ch. 462; 28 Beav. 104.

(*m*) *Grierson v. Cheshire Lines Committee*, L. R., 19 Eq. 83; 44 L. J., Ch. 15, distinguishing *Marson v. London, Chatham and Dover R. Co.*, L. R., 7 Eq. 546, on the ground that in that case a decree (L. R., 6 Eq. 101) had already settled that the company must take the whole.

(*n*) *South Devon Shipping Co. v. Metropolitan Board*, W. N. 1876, p. 167.

(*o*) See *Sowler v. G. N. R. Co.*, W. N. 1876, p. 167.

(*p*) The word "town" means a collection of inhabited houses so near to each other, that they may reasonably be said to be continuous, and the term would include a space of open ground surrounded by continuous houses, and also open spaces occupied as mere accessories to such houses, although not so surrounded. See *Lord Carington v. Wycombe R. Co.*, L. R., 3 Ch. 377, approved by the House of Lords in *L. & S. W. R. Co. v. Blackmore*, L. R., 4 H. L. 610; 19 W. R. 305. Both these cases were decided on sect. 128, which uses very similar words to those of sect. 93. See also *Elliott v. South Devon R. Co.*, 2 Exch. 725, decided on sect. 11 of the Railways Clauses Act, 1845; and *R. v. Cottle*, 16 Q. B. 412 (a turnpike road case).

4. *What may be taken; "Part" of a House.*

Company may insist on purchase of intersected land where expense of communication exceeds value.

Sect. 94.

owner thereof have other land adjoining, into which the same can be thrown, so as to be conveniently occupied therewith; and if such owner have any other land so adjoining, the promoters must, if so required by the owner, at their own expense, throw the piece of land so left into such adjoining land by removing the fences and levelling the sites, and by soiling the same in a sufficient and workmanlike manner.

By sect. 94, if any *such* (q) land is so cut through as to leave on either side of the works a piece of land of less extent than half a statute acre, or of less value than the expense of making a bridge, culvert, or such other communication between the land so divided, as the promoters are compellable to make, and if the owner of such lands have not other lands adjoining such piece of land, and require the promoters to make such communication, the promoters may require such owner to sell to them such piece of land. And any dispute as to the value of such piece of land, or as to what would be the expense of making such communication, shall be ascertained as in cases of disputed compensation; and on the occasion of ascertaining the value of the land required to be taken for the purposes of the works, the jury or the arbitrators must, if required by either party, ascertain by their verdict or award, the value of the severed piece of land, and also what would be the expense of making such communication.

It has been held that the railway company are not liable to the costs of an inquiry under this section (r).

5. *Notice to Treat.*

The company are to give notice that they are willing to treat for the purchase of land, and as to compensation. L. C. Act, s. 18.

5. *The Notice to Treat.*

Having thus seen what lands may be taken, and when the compulsory powers may be exercised, we arrive at sect. 18, which enacts that when the company shall require to purchase or take any of the lands which by the acts they are authorized to purchase or take, they shall give notice thereof to all the parties interested in such lands (s), or to the parties enabled by the acts to sell the

(q) These words refer to intersected land generally, as mentioned in the heading to sect. 93, and are not confined to land situate in a town. *Eastern Counties, &c. R. Co. v. Marriage*, 9 H. L. C. 82; 31 L. J., Ex. 78, overruling the judgment in the Exch. Ch., 27 L. J., Ex. 185; 2 H. & N. 649.

(r) *Cobb v. Mid Wales R. Co.*, 35 L. J.,

purchase his interest, though they may have given no notice to the other persons interested in the premises. *Morgan v. Metropolitan R. Co.*, L. R., 4 C. P. 97. Equitable mortgagees are entitled to notice, *Martin v. London, Chatham and Dover R. Co.*, 35 L. J., Ch. 795; L. R., 1 Eq. 145. And so is a tenant who has an equitable lien on premises in respect of buildings erected by him. *Rogers v. Hull Dock Co.*

same (d), or such of the said parties as shall, after diligent inquiry, be known to the company, and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the company are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works (u).

The notice to treat should state accurately the quantities and situation of the lands required for the railway works; and, for greater security, a plan is generally annexed to the notice (x), or reference is made to the parliamentary plan deposited at a specified place (y). If any mistake is made on the face of the plan, the company will be unable to enter on any lands which may be omitted (z).

Notice to treat.

By sect. 19 the notice must be served personally, or left at the usual place of abode of the party to be served, if any such can, after diligent inquiry, be found, "and in case any such parties shall be absent from the United Kingdom, or cannot be found after diligent inquiry, shall also be left with the occupier" of the lands, "or if there be no such occupier, shall be affixed upon some conspicuous part of such lands." This section must be strictly complied with. It is not enough, for instance, to serve the occupier, though the owner's agent, if the owner can be found (a); and it has been said that an irregularity in service by serving the occupier only just before the expiration of the compulsory powers, cannot be waived by the owner's accepting the notice after the expiration of such powers (aa).

Service of notice to treat.

By sect. 21,—

"If for 21 days after the service of such notice, any such party shall fail to state the particulars of his claim in respect of any such land, or to treat with the promoters of the undertaking in respect thereof, or if such party and the company shall not agree as to the amount of the compensation to be paid by the company for the interest in such lands belonging to such party, or which he is by this or the special act enabled to sell, or for any damage that may be sustained by him by reason of the execution of the works, the amount of such compensation shall be settled in the manner hereinafter provided for settling cases of disputed compensation" (b).

If parties fail to treat or do not agree with company, the compensation to be settled as after mentioned.

Sect. 21.

A notice to treat, when given, cannot be revoked. There is no *locus pœnitentiæ* (c). To a certain extent and for certain purposes the

Effect of notice.

(d) See sect. 2 of this Chapter.

(u) See forms of Notices, vol. II., tit. Forms.

(x) *Sims v. Commercial R. Co.*, 4 My. & C. 124; 1 Railw. Cas. 431.

(y) See the form, vol. II., tit. Forms.

(z) See *Kemp v. London and Brighton R. Co.*, 1 Railw. Cas. 495. As to how far the notice should agree with deposited plans see *Donlin v. Portsmouth & R.*

*Corporation of Huddersfield v. Jacob*, L. R., 10 Ch. 92.

(a) *Shepherd v. Corporation of Norwich*, L. R., 30 Ch. D. 553; 54 L. J., Ch. 1050; 53 L. T. 251; 33 W. R. 811, per North, J. (aa) *Ib.*

(b) The mode of proceeding to ascertain the amount of disputed compensation is the subject of Chapter VI.

(c) *R. v. Hungerford Market Co.*, 4 B.

5. *Notice to Treat.*  
Notice to treat is  
not contract.

Restriction of  
rights of land-  
owner.

relative situations of vendor and purchaser are created by giving the notice. But the notice to treat does not itself constitute a contract, nor entitle *the company* to specific performance. This was decided in *Haynes v. Haynes* (d). In that case a testator devised several freehold houses to his children specifically. After the date of the will a notice to treat in respect of the houses was served, but no step was taken under it during the lifetime of the testator. Kindersley, V.-C., after an elaborate review of the numerous authorities, held that the notice to treat did not operate as a conversion of the houses into personal property. But where the notice to treat is acted on by the landowner, as, for instance, if the landowner should, even verbally, appoint a surveyor and agree to a price, the notice constitutes a contract, notwithstanding the requirements of the Statute of Frauds (e). Where the purchase and compensation money are fixed, equity will treat the conversion of the land into money as complete (f), and an action for specific performance may be maintained by the landowner (g). The doctrine that the notice to treat of itself will entitle the landowner to a decree for specific performance *against the company* (h) cannot now be taken to be law (i). But it seems that the owner's power of dealing with his property is concluded when the notice to treat is served. Any interest which he may create after the service of the notice is not the subject of compensation (k), and he will be restrained from selling the property by auction (l). Where, however, there is great delay in proceeding on such notices they will be considered as abandoned (m); as, whatever may have been the case formerly, the modern rule of equity requires parties to be prompt in seeking the assistance of the Court in actions for specific performance. Where a notice was given which stated that the com-

pool, 7 B. & S. 261. There is an exception to this rule in cases coming within sect. 92. See sect. 4 of this chapter, ante.

(d) 1 Dr. & Sm. 426; 30 L. J., Ch. 578, A.D. 1861. See further, *Sparrow v. Oxford, &c. R. Co.*, 21 L. J., Ch. 731; *Midland R. Co. v. Orwin*, 3 Railw. Cas. 497; *Marquis of Salisbury v. Great Northern R. Co.*, 21 L. J., O. B. 185; 17 Q. B. 840; *Burkess v. Birmingham and Orford Junction R. Co.*, 5 Exch. 475; *Edinburgh and Dundee R. Co. v. Leven*, 1 Macq. 284; *Stone v. Commercial R. Co.*, 1 Railw. Cas. 375; 4 Myl. & Cr. 122; *Inge v. Birmingham, &c. R. Co.*, 1 Sm. & G. 347; 3 De Gex, M. & G. 658; *Pinchin v. London and Blackwall R. Co.*, 1 K. & J. 36; 5 De Gex, M. & G. 851. When a variance will not bar the claimant, see *Walker v. London and Blackwall R. Co.*, 3 Q. B. 744.

(e) *Watts v. Watts*, L. R., 17 Eq. 217, 13 Sim. 569.

13 Sim. 569.

(f) *Re Woolton*, 1 N. R. 193.

(g) *Regent's Canal Co. v. Ware*, 23 Beav. 576; 26 L. J., Ch. 566; *Mason v. Stokes Bay Pier and R. Co.*, 32 L. J., Ch. 110; *Harding v. Metropolitan R. Co.*, L. R., 7 Ch. 154; 41 L. J., Ch. 371.

(h) *Walker v. Eastern Counties R. Co.*, 8 Hare, 695, A.D. 1848; *Smith v. Dublin and Bray Co.*, 3 Ir. Ch. R. 225, A.D. 1853.

(i) See per Kindersley, V.-C., in *Haynes v. Haynes*, 1 Dr. & Sm. at p. 456. The landowner's remedy is by mandamus to the company to proceed upon their notice.

(k) *Re Marylebone Improvement Act*, L. R., 12 Eq. 389.

(l) *Metropolitan R. Co. v. Woodhouse*, 34 L. J., Ch. 297.

(m) *Hedges v. Metropolitan R. Co.*, 28 Beav. 109; and see *Stratton v. Great Western and Brentford R. Co.*, L. R., 5 Ch.

pany would require twenty perches of land, and, before anything further was done on either side, they gave notice of withdrawal of that notice, and that only one perch of land was required, it was ruled that the last notice was a nullity (*n*).

The right to compensation which arises upon the service of a notice to quit cannot be attached under the garnishee clauses of the Rules of the Supreme Court, Order XLV. (*o*). Attachment.

Procedure upon the notice to treat may be enforced both by mandamus and by action; and if the party to whom the notice was given has taken other premises in consequence of it, he will be entitled to recover more than nominal damages (*p*). And it is no answer to an action for not proceeding upon the notice that the capital has not been wholly subscribed, as required by the 16th section of the Lands Clauses Act, which makes such subscription a condition precedent to the exercise of the compulsory powers. The notice to treat is not necessarily an exercise of those powers, and the 16th section is for the protection of the landowner, not of the company (*q*), neither is it an answer that the company have no funds at all (*r*). Mandamus to proceed.  
Action.

The powers of the company are not exhausted when they have given one notice; they may issue a second, and require additional lands, so long as they be within the limits of deviation (*s*); they may even require and purchase, by a second notice, minerals under lands required and purchased under a first notice not including minerals (*t*). Further notice in respect of additional lands.  
In respect of minerals.

If the lands required are in the possession of a receiver, or of the committee of a lunatic, the company should make a special application to the Court, for if they proceed, without the sanction of the Court, to enforce the statutory compulsory powers, an injunction may be obtained to restrain their proceedings (*u*). Receiver.  
Committee of lunatic.

(*n*) *Taney v. Lynn and Ely R. Co.*, 16 L. J., Ch. 282; 4 Railw. Cas. 615.

(*o*) *Richardson v. Elmit*, L. R., 2 C. P. D. 9. See also *Howell v. Metropolitan District R. Co.*, L. R., 19 Ch. D. 508; 51 L. J., Ch. 508; 45 L. T. 707; 30 W. R. 100, in which it was held by Clitty, J., that money paid into Court could not be attached.

(*p*) *Morgan v. Metropolitan R. Co.*, L. R., 4 C. P. 97; 38 L. J., C. P. 87, Ex. Ch., affirming L. R., 3 C. P. 553; *Fotherby v. Metropolitan R. Co.*, L. R., 2 C. P. 188. The issue of the mandamus is discretionary, but is not likely to be refused.

(*q*) *Guest v. Poole and Bournemouth R. Co.*, L. R., 5 C. P. 553; 39 L. J., C. P. 329.

(*r*) See *ib.*, and the remarks of Paterson, J., *R. v. Commissioners of Woods and Forests*, 15 Q. B. 761.

(*s*) *Stamps v. Birmingham and Stour*

*Valley R. Co.*, 7 Hare, 251; 17 L. J., Ch. 431; 6 Railw. Cas. 123; *Simpson v. Lancaster and Carlisle R. Co.*, 15 Sim. 508; 4 Railw. Cas. 325; *Williams v. South Wales R. Co.*, 8 De G. & S. 354; 13 Jur. 413; *Sadd v. Maldon and Braintree Ir Co.*, 6 Exch. 143; 20 L. J., Ex. 102.

(*t*) *Errington v. Metropolitan District R. Co.*, L. R., 19 Ch. D. 559—C. A.; L. J., Ch. 46 L. T. 443.

(*u*) *Re Taylor*, 6 Railw. Cas. 741; *Tink v. Rundle*, 10 Beav. 318. In the case of a purchase from the committee of a lunatic, the purchase-money may be paid at once to the credit of the lunacy, and need not be paid into Court under the 69th section of the Lands Clauses Act, 1815. *Re Mines*, L. R., 1 Ch. Div. 28. For instance of investment of purchase-money in guaranteed railway stock, see *Buckingham, In re*, L. R., 2 Ch. D. 690.



5. Notice to Treat.

Waiver of notice  
to treat by con-  
duct of party  
interested.

The issuing of the notice to treat is the foundation of the right of the company to proceed to assess the compensation (x); but if a party interested in lands enter into negotiations with the company, and agree to waive the necessary notice to treat, he is afterwards estopped from taking the objection that he never received a notice (y); and, on the same principle, it was decided that the company, after appearing before a jury, cannot object to an inquisition on the ground that it did not disclose that a notice to treat had been duly served (z).

Labouring  
classes.

Before leaving this part of the subject, it may be well to refer to a general notice which companies may sometimes be bound, by their special acts, to give before taking a certain number of houses occupied by the labouring classes. The Standing Orders up to 1884 (a) required the insertion of clauses, of which the following are specimens:—

Notice of taking  
houses.

"The company shall, not less than eight weeks before they take in any parish fifteen houses or more, occupied, either wholly or partially, by persons belonging to the labouring classes as tenants or lodgers, make known their intention to take the same by placards, handbills or other general notice placed in public view upon or within a reasonable distance from such houses, and the company shall not take any such houses until they have obtained the certificate of a justice that it has been proved to his satisfaction that the company have so made known their intention."

Accommodation  
for persons dis-  
placed.

"Before taking in any parish fifteen houses or more, occupied, either wholly or partially, by persons belonging to the labouring classes as tenants or lodgers, who may for the time being be the occupier or occupiers of any house or part of a house which the company are by this act authorized to acquire, the company shall (unless the company and such person or persons otherwise agree) procure sufficient accommodation elsewhere at moderate rents for such person or persons: provided always, that if any question shall arise as to the sufficiency of such accommodation, the same shall be determined by a justice; and the company may, for the purpose of procuring such accommodation, appropriate any lands for the time being belonging to them or which they have power to acquire, and may purchase by agreement such further lands as may be necessary for such purpose, and may on such lands erect labouring-class dwellings, and may apply for the purposes of this section, or any of them, any monies they may have already raised or are authorized to raise" (b).

6. Notice of ClaimG. The Notice of Claim.

When the party claiming has received notice from the company requiring him to treat, he must, without loss of time, determine on the course which he will pursue. He may, within twenty-one days, as mentioned in sect. 21, state the particulars of his claim, and

(x) *R. v. Bagshaw*, 7 T. R. 303; *R. v. Mayor of Liverpool*, 4 Burr. 2244; *R. v. Trustees of the Norwich Roads*, 5 A. & E. 503.

(y) *R. v. Committee for the South Island Drainage*, 8 A. & E. 429.

(z) *R. v. Trustees of Swansea Harbour*, 8 A. & E. 447; see also, as to estoppel of

*sioners of Sewers of City of London*, L. R., 22 Ch. D. 72.

(a) C. S. O. 185, 186; L. S. O. 110; now replaced by C. S. O. 183, A. and L. S. O. 111, which dispense with these notices, but require the consent of certain local authorities.

(b) Metropolitan District Railway Act.

endeavour to treat with the company as to the amount of compensation to be paid to him (c).

This claim should state correctly the nature of the claimant's interest in the land, and if he be owner, any existing tenancies should be specified. An error in this respect may be fatal to all the subsequent proceedings, as will appear by the following cases.

Notice of claim should state claimant's interest accurately.

In one case (d), it appeared that the claimants, in answer to a notice given by the company, stated that, as trustees under a will, they claimed an estate and interest in copyhold lands and hereditaments, and they claimed a certain sum as compensation for the said lands and hereditaments, and appointed an arbitrator. The company, by a notice which recited the claimant's notice, appointed an arbitrator on their behalf, and an umpire being chosen, he made his award, whereby he awarded that a certain sum was the value, and should be paid to the trustees "for the purchase of the fee simple in possession, free from all incumbrances, of and in the said copyhold lands" required. The Court of Exchequer held the award to be bad for uncertainty, inasmuch as it ought to find the particular interest of the parties, whether an estate in fee or for life, and the umpire had neither valued the interest of the claimants, nor found as a fact that they were entitled to the fee simple.

Requisites of claim under L. C. Act, s. 21.  
*North Staffordshire R. Co. v. London.*

But where a claimant required the company to settle the amount of compensation to be paid to him "for the fee simple in possession" of land in the occupation of J. L., and the umpire by his award gave compensation for "the absolute purchase of the fee simple in possession of the land, and also for the immediate possession thereof," it was objected on behalf of the claimant that the award assumed that the claimant was in possession, and that it was therefore bad; but the Court said the answer was, that such assumption, if actually made, was in the claimant's favour and to his advantage, and therefore no matter of complaint for him. And further, that it did not appear clearly that any such assumption was made. The expression "fee simple in possession," in the claim, was used in contradistinction to fee simple in reversion or remainder. The compensation given could only be taken to be in respect of what was claimed; and if the tenants

*De Bradeham.*

(c) See the form, Appendix, tit. *Forms*.  
(d) *North Staffordshire R. Co. v. London*, 2 Exch. 285; 17 L. J., Ex. 350. A notice which did not mislead would be held good, *Eastham v. Blackburn R. Co.*, 23 L. J., Ex. 199. In *Cameron v. Churing Cross R. Co.*, 16 C. B. N. S. 430; 10 L. T. 381; 33 L. J., C. P. 313, where a tenant under a lease for 7, 14 or 21 years claimed as "occupier" simply, it was held sufficient, though Erle, C. J., said it was the barest notice that would pass under the

decision in *Bickell v. Metropolitan R. Co.*, L. R., 2 H. L. 175 (which overruled *Cameron's case*), does not affect this point. See also *Healey v. Thames Valley R. Co.*, 34 L. J., Q. B. 52; 5 B. & S. 769; 11 L. T. 268, where a notice that the lands "are held by me on lease," with a claim "for the value of my estate and interest in the said lands," was held not sufficient under sect. 68. But the Court, in giving judgment, did not notice sect. 122.

*a* Notice of Claim

had any claim in respect of the actual possession of the land, their remedy was against the company, and not against the owner of the fee (*e*).

Proceeding to arbitration cannot be restrained by injunction.

The High Court has no jurisdiction to restrain a claimant from proceeding on his claim before an arbitrator; the time for deciding on his title to compensation is when he brings an action to enforce the award if made in his favour (*f*); nor if the company should incur costs in an arbitration upon a claim made without title, does there seem to be any method whereby the company can recover costs from such claimant (*g*).

Claim should apply to same premises as those in company's notice.

Care should also be taken that the claim describes the same premises as those which are the subject of the company's notice. Thus a company gave notice to the owners of certain land to treat for the purchase thereof, and the landowners thereupon sent the company a notice stating that their interest in the land was particularly described in a schedule of claim served therewith, and that they claimed a certain sum as compensation for the same, and for damage sustained by the execution of the railway, and that, upon payment of such sum, they were willing to convey all their estate in the said land, and that, if the amount were not paid, they desired the matter to be settled by arbitration, and required the company to appoint an arbitrator. In the schedule of claim annexed to this notice were included certain pieces of land (not included in the company's notice), which the owners, under sect. 93, required the company to purchase as lands severed by the railway, and of less than half an acre. The company then gave the landowners a notice, whereby, after reciting their notice, they appointed an arbitrator; to whom was to be referred the amount of compensation to be paid to the landowners "for the purchase of the said lands." The umpire received evidence of the value of the pieces of land, less than half an acre, and awarded one entire sum for the purchase of the fee simple of the land which the company required to purchase, and also of the portions of land which the owners required the company to purchase; but it was decided that the award was bad, there being no valid submission in respect of the last-mentioned lands (*h*).

Claimant should give notice if he requires the whole of his premises to be taken

Page 167, *note*.

If the company give notice of their intention to take a part only of a house or other building, in a case where by force of the 92nd section they may be compelled to take the whole of the premises,\* it is the duty of the interested party forthwith to give the company notice that they are required to take the whole; for sect. 92 is not

(*e*) *Bradshaw's Arbitration*, 12 Q. B. 562; 17 L. J., Q. B. 362.  
(*f*) *London and Blackwall R. Co. v. Cross*, 55 L. J., Ch. 318—C. A.

(*g*) Per Lindley, L. J., *ib*.  
(*h*) *North Staffordshire R. Co. v. Wood*, 2 Exch. 244; 17 L. J., Ex. 354.

imperative on the company to take the whole, unless the owner requires them to do so (z).

If the claimant serve a claim upon the company to take the whole, and such claim cannot be supported, the acceptance by the company's solicitors of the bad counter-notice containing such claim does not bind the company (k).

Effect of bad counter-notice to take whole.

We will now assume that the party interested in the lands gives no notice to the company, and takes no step to treat under sect. 21: in such a case, the company are authorized to deal with the case as one of disputed compensation.

As to disputed compensation.

As to disputed compensation, sect. 22 enacts, that if no agreement be come to between the company and the parties able to sell, as to the value of the lands, and if the compensation claimed do not exceed 50*l*., the same shall be settled by two justices (l). The mode of doing this is pointed out by sect. 24 (m).

Under 50*l* to be settled by justices. Sect. 22.

By sect. 23, if the compensation claimed or offered in any such case exceed 50*l*., and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the company, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, stating in such notice the nature of the interest and the amount of the compensation claimed, the same shall be so settled accordingly; but unless the party claiming compensation signify his desire to have the question of such compensation settled by arbitration, or if when the matter shall have been referred to arbitration the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury (n).

Above 50*l*. to be settled by arbitration or jury at option of claimant. Sect. 23.

Sect. 38 requires the company to give the party ten days' notice of their intention to summon a jury to assess the compensation, and the notice must also state what amount of compensation the company are willing to pay.

Notice of the jury. Sect. 38.

On the receipt of this notice, the party who claims compensation has ten days allowed him to determine whether he will accept the offer made by the company, or not; and if he determines to decline the offer, he may declare his desire that the amount of the compensation shall be assessed by arbitrators, and not by a jury; for, as we have seen, by sect. 23, the party who claims compensation has, in all cases, the option of having the amount of it (if it exceeds 50*l*.)

Claimant may demand arbitration.

a

(z) *Sparrow v. Oxford and Wolverhampton R. Co.*, 2 De G., M. & G. 94.  
(k) *Treadwell v. London and South*

*Kay, J.*  
(l) 8 & 9 Vict. c. 18, s. 22, vol. II.  
(m) See as to this, post, Chap. VI.  
(n) 8 & 9 Vict. c. 18, s. 23, vol. II.

6. Notice of Claim assessed by arbitrators, provided he gives the company notice thereof in due time. If, therefore, the party be desirous of referring the question of compensation to arbitration, he must take care to serve a notice on the company, stating such to be his desire, before the expiration of ten days from the day when he received the company's notice of their intention to summon a jury. After that period has elapsed, the company are authorized to issue their warrant to summon a jury (o); and if the warrant is once issued, it will be too late to require the appointment of arbitrators. It is, however, to be observed that the company have no option to require that the compensation shall be assessed by arbitrators; they can only issue a warrant to the sheriff, after having given the notice required by sect. 38.

Company cannot demand arbitration.

Interest on purchase-money.

Interest at four per cent. on the purchase-money is payable from the date of the award or verdict, not from the date of the company entering into possession. This was held in a case where a reversion was assessed by a jury, subject to short tenancies, until the expiration of which, the company not having treated with the tenants, possession could not be taken (p).

7. Entry under L. C. Act, Sect. 83.

*7. Entry before Purchase-Money ascertained, under Sect. 83 of the Lands Clauses Act.*

Reserving for future consideration the mode of assessing the amount of disputed compensation before the different tribunals (q), we may observe that all the steps we have hitherto pointed out are applicable to cases wherein the company may not desire to obtain possession of lands to be purchased or permanently used, until after the purchase-money and compensation are ascertained, and the amount paid or deposited in the Bank.

Company may injuriously affect lands, before compensation is assessed.

We must now, however, turn to a very important class of cases of frequent occurrence,—i. e., cases where the company have given a notice to treat, but desire to enter on the lands before the amount of the purchase-money and compensation to be paid is ascertained; and this will necessarily lead us to notice other cases, where the company have taken lands or injuriously affected them by their works, without any notice,—and without having previously made satisfaction to the parties entitled to receive compensation. It will be convenient to state the clauses in the acts which relate to both these matters, before we offer any observations on the numerous decisions, and it will be

(o) Ibid.

(p) *Eccleshill Local Board, In re*, L. R., 13 Ch. D. 365. As to interest under s. 85, see *Rhys v. Dore Valley R. Co.*, L. R., 19

Eq. 93, post, note.

(q) Chap. VI. "On the Mode of assessing Compensation," post.

seen that the Consolidation Act is so framed, as to make it essential that both subjects should be considered together.

With respect to the entry upon lands by the company: By sect. 84 it is enacted, "that they shall not, except by consent of the owners and occupiers, enter upon any lands (*r*) which shall be required to be purchased or permanently used (*s*) for the purposes and under the powers of the acts, until they shall either have paid to every party having any interest in such lands (*t*) or deposited in the Bank, in the manner herein mentioned (*u*), the purchase-money or compensation agreed or awarded to be paid to such parties respectively, for their respective interest therein: *provided always*, that for the purpose merely of surveying and taking levels of such lands, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works, it shall be lawful for the company, after giving not less than three nor more than fourteen days' notice to the owners or occupiers thereof, to enter upon such lands without previous consent, making compensation for any damage thereby occasioned to the owners or occupiers thereof" (*v*).

Clauses relating to entry on lands.  
L. C. Act, s. 81.

For purpose of surveying, and setting out line.

Sect. 76 provides, that if the owner, on tender of the purchase-money or compensation, either agreed or awarded to be paid, refuse to accept the same, or fail to make out a title to the satisfaction of the company; or if he refuse to convey the lands as directed by the company; or if he be absent from the kingdom, or cannot be found; or fail to appear on the inquiry before a jury; the company may deposit the purchase-money or compensation payable in the Bank of England, to the credit of the parties interested, subject to the control of the Court of Chancery in England, or the Court of Exchequer in Ireland. By sect. 77, when the money has been thus deposited,

(*r*) As to where "lands" includes easements, and as to compensation for taking easements, see *Temple Pier Co. v. Metropolitan Board of Works*, 34 L. J., Ch. 202; 11 Jur., N. S. 337; *Bucolouch (Duke of) v. Metropolitan Board of Works*, L. R., 5 H. L. 418 (under a special act). If the company give notice to take part, and the landowner require them, under sect. 92, to take the whole, the company cannot enter upon paying into Court the value of part, but must pay in the value of the whole. *Giles v. London, Chatham and Dover R. Co.*, 30 L. J., Ch. 603.

(*s*) Making a permanent tunnel through the soil, without disturbing the surface, amounts to a permanent using of the lands. *Ramsden v. Manchester and Altrincham R. Co.*, 1 Exch. 723; 12 Jur. 293. And so does entry on land for the purpose of diverting over it a public highway. *Rangeley v. Midland R. Co.*, 37 L. J., Ch. 313.

But taking soil merely for the purpose of an embankment does not. *Erryfield v. Mid Sussex R. Co.*, 23 L. J., Ch. 107. Where the entry is unlawful, ejectment or trespass may be maintained; *Doe d. Hutchinson v. Manchester, Bury and Rossendale R. Co.*, 14 M. & W. 687; 15 L. J., Ex. 208. But if the question of compensation be settled by arbitration, and an award be given, the owner's remedy is to proceed upon the award. *Doe d. Huston v. Leeds and Bradford R. Co.*, 20 L. J., Q. B. 486; 15 Jur. 946; 16 Q. B. 796. See also *Knapp v. London, Chatham and Dover R. Co.*, 32 L. J., Ex. 236.

(*t*) See *Rogers v. Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 165.

(*u*) That is, by s. 76, *infra*.

(*v*) By 8 & 9 Vict. c. 20, s. 24, post, vol. II., a penalty of 5*l.* is imposed on persons obstructing companies' servants in setting out the line, &c.

7. *Entry under*  
*L. U. Act,*  
*Sect. 85.*

the cashier of the Bank is required to give the company a receipt for the same; whereupon the company may execute a deed-poll containing a description of the lands, and declaring the circumstances under which the deposit has been made; "and thereupon all the estate and interest in such lands of the parties, for whose use and in respect whereof such purchase-money or compensation shall have been deposited, shall vest absolutely in the company, and as against such parties they shall be entitled to immediate possession of such lands."

The construction of these sections was much discussed in *Douglas v. L. & N. W. R. Co.* (x) and *Ex parte Winder* (y). In the former of these cases it was held that a company could not be compelled to pay the purchase-money into Court by a person who had contracted to give a sixty years' title but had not done so. In the latter a company had agreed to buy land from a person having only a possessory title of nineteen and a half years. The company executed a deed-poll under the 77th section. No claim was made by or through the true owner till after twenty years had expired. It was held that the representatives of the person who sold with the possessory title only were entitled to the purchase-money as against the representatives of the true owner, whose title was held to have been barred by the Statute of Limitations then in force which conferred a title by twenty years' possession.

We now come to sect. 85, the effect of which, as amended by the Railway Companies Act, 1867, s. 36, is this:—

Entry before  
purchase on  
making deposit  
and giving bond.  
Sect. 85.

If the company be desirous of entering upon and using (z) lands before an agreement has been come to, or an award made or verdict given for the purchase-money or compensation to be paid, the company may deposit (a) in the Bank, by way of security, either the amount of purchase-money or compensation claimed by any party interested in (b) or entitled to sell the lands, or such a sum as shall, by a surveyor appointed by the Board of Trade, be determined to be the value of the lands, or of the interest therein, which the party is able to sell (c). They may also give to such party a

(x) 3 K. & J. 173, per Wood, V.-C.

(y) L. R., 6 Ch. D. 696, per Hall, V.-C.

(z) The lands are not "taken" under this section. *Great Western R. Co. v. Swindon and Cheltenham R. Co.*, L. R., 9 App. Cas. 787, per Lord Bramwell and Lord Watson. Entry under this section has been held no exercise of compulsory powers within the meaning of s. 16, ante, p. 165. *Ford v. Plymouth, &c. R. Co.*, W. N. for Nov. 19, 1887, per North, J.

(a) The proceedings under this section were held, by Wigram, V.-C., not to be

invalid, although the money appeared to have been deposited two days before the date of the valuation. *Stamps v. Birmingham and Stour Valley R. Co.*, 6 Railw. Cas. 126.

(b) A tenant who has received notice to quit which has expired, but who is entitled to compensation for buildings erected by him, has a sufficient interest to entitle him to relief if the requisites of this section are not complied with. *Rogers v. Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 165.

(c) No notice need be given by the company to the owner of their intention to

bond (d), with two sureties, to be approved of by the Board of Trade, in case the parties differ, and after hearing the parties, in a penal sum equal to the sum so to be deposited, conditioned for payment to such party, or for deposit in the Bank for the benefit of the parties interested, of all such purchase-money or compensation, as may be determined to be payable by the company in respect of the land so entered upon, together with interest at 5l. per cent. per annum, from the time of entering on such lands, until such purchase-money or compensation shall be either paid or deposited in the Bank, as the case may require. Upon such deposit by way of security being made, and such bond being delivered or tendered to such non-consenting party, the company may enter upon and use the lands without having first paid or deposited the purchase-money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them under the provisions of the act (e). It seems that compensation for minerals under sects. 78 and 81 of the Railways Clauses Act of 1845 is not within the condition of the bond required by this section (f), also that the landowner may sue for damages by the removal of minerals, and is not limited to the special statutory remedy for compensation (g).

Minerals.

It has been said that a company has no right to proceed under sect. 85, unless there is an urgent necessity for immediate entry on the land (h), but their powers are not so limited by the section itself, and it is submitted that the Court has no jurisdiction so or otherwise to limit them (i). An entry, for instance, at a time when it is almost manifest that the railway cannot be made over the land within the statutory period for making it is perfectly lawful. This appears from *Loosemore v. Tiverton and North Devon R. Co.* (j), in which the company entered only thirteen days before the expiration of the five years limited by the special act for completing the railway. The Court of Appeal held that such an entry was an abuse of the powers of the Act, and that the landowner was entitled to recover possession, but

Duration of powers of s. 85.  
*Loosemore v. Tiverton and North Devon R. Co.*

take these proceedings. See *Bridges v. Wills, Somerset and Weymouth R. Co.*, 4 Railw. Cas. 622; 16 L. J., Ch. 335; 11 Jur. 315. See also *Poynder v. Great Northern R. Co.*, 5 Railw. Cas. 196; *Langham v. Sama*, 1 De Gaz & Sm. 486; 5 Railw. Cas. 263; 16 L. J., Ch. 437.

(d) See as to this bond, post, p. 189.  
(e) 8 & 9 Vict. c. 18, s. 85; 30 & 31 Vict. c. 127, s. 36, post, vol. II. If a railway company avail themselves of the compulsory powers given by this and the following sections, they cannot also enforce specific performance of an agreement entered into with respect to the same lands. *Bedford and Cambridge R. Co. v. Stanley*, 32 L. J., Ch. 60

(f) *Ex parte Neath and Brecon R. Co.*, L. R., 2 Ch. Div. 201.

(g) *Loosemore v. Tiverton and North Devon R. Co.*, L. R., 22 Ch. D. 25; 51 L. J., Ch. 570, per Fry, J.

(h) *Fild v. Carnarvon and Llanberis R. Co.*, L. R., 5 Eq. 190; 37 L. J., Ch. 176, per Malins, V.-C.

(i) See per Selborne, C., in *Loosemore's case*, infra, 22 Ch. D. at p. 46.

(j) *Loosemore v. Tiverton and Devon R. Co.*, L. R., 9 App. Cas. 480; reversing 22 Ch. D. 25; 53 L. J., Ch. 812; 50 L. T. 637; 32 W. R. 929; 52 L. J., Ch. 260; 43 L. T. 162; 31 W. R. 130—C. A.; and restoring the judgment of Fry, J.



7. Entry under  
L. C. Act,  
Sect. 85.

the House of Lords reversed that decision. In delivering the judgment of the House, after a second argument, Lord Cairns observed :—

“The land was wanted for the railway, and possession was taken in order to make the railway, and not for any different or collateral object. It is settled law that the powers under the 85th section, even in the case of a compulsory purchase, are not compulsory powers, and are exercisable after the period for compulsory purchase has expired (*Salisbury v. Great Northern Railway*, 17 Q. B., 840). The period [13 days] appears a short one for making a railway across the land, but there is no evidence, or even allegation, that it could not have been done by an adequate expenditure of time and money ; and even if evidence had been adduced on this head I do not see how it is an issue which could be properly tried and decided by the Court, and I see nothing in the Act which engrafts on the absolute power given by the 85th section a qualification that possession must be taken, not only within five years, but also so long before the expiration of the five years as that the railway can be made on the land within five years. Such a reading of the 85th section would make the power to be one exercisable, not within five years, but within five years minus so many weeks or months as would be needed to make and complete the railway. I can see here no laches or bad faith on the part of the company. Delay there undoubtedly was, but much, and indeed most, of the delay is explained by the attitude throughout taken up by the respondent, and by the controversies, generally groundless, raised by him. And, in the absence of laches or bad faith, I can see no ground on which the company can be pronounced in the wrong for following, within the Parliamentary period, the Parliamentary right given by the 85th section. The statute appears to me to place the company and the respondent, by the notice to treat, in a position analogous to that of vendor and purchaser, with power to either side to have the price fixed and paid without delay, and with a further right in the company, within the period of five years, and without prejudice to the machinery for ascertaining the price, on giving adequate security for the highest value of the land, to take possession and make use of the land, whatever the legal consequence of that possession after the expiration of the five years may be.”

Right of unpaid  
vendor.

But when the company are using the land, and have actually opened the line for traffic, the landowner, if not fully paid, may enforce the rights of an ordinary unpaid vendor, and obtain a sale of the land (*k*).

Easement under  
special act.

Where a company was empowered by special act to acquire an easement by tunnelling unless a jury should find that such easement could not be acquired without detriment to the land, it was held that the company might enter upon the land for tunnelling upon depositing the value of the easement, and need not deposit the value of the land (*l*).

Deposit remains  
to the credit of  
the owner of  
the lands,  
Sect. 86.

By sect. 86, as amended by the Chancery Funds Act, 1872 (*m*), and the Judicature Act, 1873 (*n*), the money thus directed to be paid into the Bank is placed to the account of the Paymaster-

(*k*) *Wing v. Tottenham and Hampstead Junction R. Co.*, L. R., 3 Ch. 740; 37 L. J., Ch. 654.

(*l*) *Hill v. Midland R. Co.*, L. R., 21 Ch. D. 143; 51 L. J., Ch. 774; 47 L. T.

225; 80 W. R. 774, per Fry, J.

(*m*) 35 & 36 Vict. c. 44, which abolishes the office of Accountant-General in Chancery, and substitutes the Paymaster-General.

(*n*) The statutory jurisdiction of the

General, to the credit of the parties interested in or entitled to sell the lands to be entered upon, subject to the control and disposition of the Chancery Division of the High Court of Justice, and the company are entitled to receive a receipt for the deposit.

By sect. 87, this deposit remains by way of security (o) to the parties whose lands shall have been entered upon, for the performance of the condition of the bond, and may be invested in bank annuities or government securities and accumulated; and, upon the condition of the bond being fully performed, the Court may order the money, with the accumulations, to be repaid or transferred to the company; or if the condition be not fully performed, the Court may order the same to be applied for the benefit of the parties for whose security the same was deposited. It is now settled, that when the company has taken possession under sect. 85, and has complied with the provisions of that section by giving a bond and depositing money in Court, the company is entitled as of right to have the money repaid, upon fulfilling the conditions of the bond. But if the conditions of the bond be not performed, the landowner may on petition adversely to the company, have the money paid out to him, without previously obtaining any charge upon it by a judgment (p). The Court has no power to order any costs to be paid out of the money deposited (q).

Deposit returned  
on performance  
of conditions of  
bond.

Sect. 87.

Repayment.

By sect. 89, if the company or their contractors wilfully enter upon and take possession of any lands which shall be required to be purchased or permanently used, without the proper consent, or without having made the proper payment or deposit, the company "shall forfeit" to the party in possession the sum of 10*l.* over and above the amount of any damage done, the penalty and damage to be recovered before two justices. If the company or their contractors, after conviction in the penalty, continue in unlawful possession of the lands, the company "shall be liable to forfeit" the sum of 25*l.* for every day they or their contractors remain in possession, such penalty to be recoverable by the party in possession of such lands, with costs, by action in any of the superior courts. But it is provided (r), that the company is not to be subjected to the payment of any such penalties

Penalty for entry  
without consent  
or payment or  
deposit.  
Sect. 89.

Court of Chancery is, by sect. 34, assigned to the Chancery Division.

(o) Money paid in under sect. 85 is only a security for what shall upon inquiry be found to be the value of interests taken. *Martin v. London, Chatham and Dover R. Co.*, 35 L. J., Ch. 795.

(p) *Mutlow's Estate, In re*, L. R., 10 Ch. D. 181.

(q) *Ex parte Neath and Brecon R. Co.*, L. R., 9 Ch. 263; 43 L. J., Ch. 277, reversing *Bacon, V.-C.*; *Ex parte Stevens*, 13 Jur. 2, reversing *Knight-Bruce, V.-C.* The vendor should be a co-petitioner, or it

should be shown by affidavit that he was served with a copy of the petition. *Ex parte South Wales R. Co.*, 6 Railw. Cas. 151.

(r) In construing a clause in a special act, similar to the above, Pollock, C. B., said, "Sections like this, which may be justly called penal, should be strictly construed, but a proviso which has the effect of saving parties from penal enactments should be liberally construed." *Hutchinson v. Manchester, Bury and Rossendale R. Co.*, 15 M. & W. 814; 15 L. J., Ex. 293; 3 Railw. Cas. 748.

7. Entry under  
L. C. Act,  
Sect. 83.

as aforesaid, "if they shall bonâ fide, and without collusion, have paid the compensation agreed or awarded to be paid in respect of the said lands to any person whom the company may have reasonably believed to be entitled thereto, or shall have deposited the same in the Bank for the benefit of the parties interested in the lands, or made the deposit, by way of security, although such person may not have been legally entitled thereto" (s).

Actions for  
penalties.  
Sect. 90.

On the trial of any action for such penalty, the decision of the justices is not conclusive as to the right of entry on any such lands by the company (t).

Sheriff may de-  
liver possession.  
Sect. 91.

If, in any case in which, according to the provisions of the acts, the company are authorized to enter upon and take possession of any lands required for the purposes of the undertaking, the owner or occupier of any such lands, or any other person, refuse to give up the possession thereof, or hinder the company from entering upon or taking possession of the same, the company may issue their warrant to the sheriff to deliver possession of the same to the person appointed in such warrant; and upon the receipt of such warrant, "the sheriff shall deliver possession" accordingly, the costs of the warrant to be paid by the person refusing to give possession (u). Unless, however, the landowner, although refusing, actually resist their entry, the company are justified in entering peaceably without the assistance of the sheriff (x).

Statutory re-  
medy of owner  
or occupier, if  
lands have been  
taken, or injuri-  
ously affected,  
without compen-  
sation being  
paid.  
Sect. 98.

The statutory remedy of the owner or occupier whose lands have been taken or affected is provided by the 68th section, which relates to cases under sect. 85, as well as to other cases where lands have been taken or affected otherwise than by agreement. This important section, which applies to persons under disability claiming compensation as well as to owners in fee (y), enacts that if any party shall be entitled to any compensation in respect of any *lands* or of *any interest therein*, which shall have been *taken for*, or *injuriously affected by*, the execution of the works, and for which the company shall not have made satisfaction, and, if the compensation *claimed* in such case shall exceed 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and, if such party desire to have the same settled by *arbitration*, it shall be lawful for him to give notice in writing to the company (z) of such his desire, stating in such notice the *nature of the interest* in such lands *in respect of which* he claims compensation,

(s) 8 & 9 Vict. c. 18, s. 89, vol. II.

(t) Ibid. s. 90, vol. II.

(u) Ibid. s. 91, vol. II.

(x) *Loosemore v. Tiverton and North Devon R. Co.*, L. R., 22 Ch. D. 25; 51 L. J., Ch. 570, per Fry, J.

(y) *Stone v. Mayor of Yeovil*, L. R., 2 C. P. D. 99—C. A.

(z) See ante, sect. 6, "Notice of Claim." The plaintiff's messuages being injured by the works of "the Blackburn R. Co.," he served the secretary, at his office, with a notice under this section, addressed to "The Blackburn and Clitheroe R. Co.;" held sufficient. *Eastham v. Blackburn R. Co.*, 9 Exch. 758.

and the amount of the compensation so claimed therein; and unless the company be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by *arbitration* in the manner herein provided; or, if the party so entitled as aforesaid desire to have such question of compensation settled by a *jury*, it shall be lawful for him to give notice in writing of such his desire to the company, stating such particulars as aforesaid; and, unless the company be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided; and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid, the amount of compensation so claimed; and the same may be recovered by him, with costs, by action in any of the superior courts (a).

Thus we see that the company may enter upon lands without the consent of the owners, provided a deposit of money be first made in the Bank of England, and a bond be also given (b); and further, that if any lands are taken or injuriously affected by the company's works, and for which the company may not have made satisfaction, a summary remedy for the recovery of such satisfaction is given by the statute.

We proceed to notice the decisions upon these important matters, —and, first, it is incumbent on the company, when they seek to avail themselves of the powers of entry, after a deposit made and bond given, to be able to show clearly and satisfactorily, that they have fulfilled all the conditions contained in the statutes; for the Courts have always been disposed to give the benefit of any doubt on this point to landowners, whose control over their own property is so seriously interfered with. Thus, it has been ruled that *the bonds should be given in the very terms of the statute*. In a case where the bond, instead of being conditioned for "payment to the party, or deposit in the Bank for the benefit of the parties interested," was conditioned for "payment to the party, his heirs, executors, administrators, or assigns, and for deposit in the Bank of England, or otherwise, for the benefit of the parties interested, as the case might require, under the provisions of the Lands Clauses Consolidation

Decisions on the foregoing clauses.

The bond should be given in the very terms of the statute.  
*Hocking v. Phillips*.

(a) Where by a special act the Lands Clauses Act, "except so much as related exclusively to the purchase and taking of land by compulsion," was incorporated with it, it was held that the 68th section of the Lands Clauses Act was not excepted.

*Brookbank v. Imperial Gas Co.*, 26 L. J., Ch. 278. See post, Chap. V., "On Compensation."

(b) See form of bond, post, vol. II., tit. *Forms*.

7. *Entry under  
L. C. Act,  
Sect. 86.*

Act," it was decided that the bond was not in compliance with the statute, by reason of the introduction of the words "or otherwise." Parke, B., said,—

"If the only objection had been, that, instead of being conditioned for payment to the plaintiff simply, it introduces the words 'heirs, executors, administrators and assigns,' I should have doubted whether it was bad on that account (c), for it is in effect implied from the nature of the bond that, if the plaintiff dies, payment shall be made to the party entitled to the estate; that is, if freehold to his heirs, if leasehold to his executors. Then, with regard to the other objection, I think that the words 'or otherwise' are not authorized by the act of Parliament. The words of the act are plain. The bond is to be conditioned 'for payment to the party, or deposit in the Bank for the benefit of the parties interested,' and no more. That is required before the company are authorized to enter upon the land, and difficulty arises from introducing equivalents. I conceive that a great difficulty might be imposed on a plaintiff, in the event of his being obliged to sue on a bond conditioned for payment in any other way than that provided by the act of Parliament. The 85th clause requires only two modes, either payment to the party himself, or deposit in the Bank of England. There is no doubt about the proper form, and these companies would exercise a wise discretion if in future they would confine themselves to terms of the act" (d).

*Poynder v. Great  
Northern R. Co.*

So where the condition was, if the obligors "do and shall *on demand* well and truly pay, or cause to be paid, to the plaintiff, his heirs, executors, administrators or assigns, or do or shall *on demand* deposit in the Bank of England" the amount of the purchase-money or compensation when it should have been determined: Lord Cottenham, C., although the plaintiff might be considered rather a gainer than a loser by the departure in the form of the bond from that strictly prescribed by the act, continued an injunction until the company should have given a bond in conformity with the provisions of the act (e).

*Willey v. South  
Eastern R. Co.*

But where the company were dealing with the lessee of lands, in respect of his individual interest therein, and, no agreement being made between the parties, the company gave a bond conditioned for payment by the company "to the lessee, his executors, administrators, or assigns, or for the deposit in the Bank of England, as the case might require, for his or their benefit, under the provisions of the Lands Clauses Consolidation Act, of all such purchase-money or compensation as may, in the manner by the same act provided, be determined to be payable by the company in respect of the interest of the said lessee in the said hereditaments:" Lord Cottenham, C., held

(c) See on this point *Dakin v. L. and N. W. R. Co.*, 3 De G. & S. 414, where a bond given to a leaseholder in this form was objected to; but no intimation appears of the opinion of Knight-Bruce, V.-C., who sent that case to law.

(d) *Hosking v. Phillips*, 3 Exch. at p. 181; 18 L. J., Ex. 1, *S. C.*

(e) *Poynder v. Great Northern R. Co.*, 5 Railw. Cas. 196; 2 Phillips, 330. See also *Langham v. Same*, 1 De G. & S. 486; 5 Railw. Cas. 263; 16 L. J., Ch. 437.

that the bond was sufficient, and that it was not necessary to use the alternative form. His Lordship observed,—

“The company have dealt with the party as the owner of the lease ; this they were perfectly competent to do. If they agreed with him, and ascertained the value of the leasehold interest, having bought his lease at a price so agreed on, they were not bound to look to any other parties ; because they, at their own risk, deal with him as owner of the lease, and he claims as such owner. Still, as he is only owner of the lease, the company have to require from him, before he can receive the value of the land taken, the performance of certain acts by which their title is to be completed. He must assign to them the lease ; he must part with that which they have purchased, before he can call upon them to part with the purchase-money. The mode in which the question arises here is, that the company only require to have the money kept in medio, until the time shall come when the lessee shall be advised to entitle himself to the money, upon the terms of doing all that he is compellable to perform before he can receive the money. The bond, therefore, provides precisely for that event ; nor do I know in what language that can be better provided for. It may be true that the party was not entitled to receive the whole of the money ; that is to say, the company might have dealt with him as a party under the provisions of the act, not under his estate, but under his power of selling, but that is not the case here. The company have dealt with him in respect of his own interest, and are willing to deal with him and to purchase his interest, only requiring to have the means, as against him, of compelling him to deal with that interest so as to vest it in themselves. Now the case of *Poynder v. Great Northern R. Co.* (ante, p. 184) has been compared to this. I have looked at it several times in order to find out the similarity, and I cannot discover it. The company did not, in that case, deal with the party as having the beneficial interest ; but, on the contrary, the bond was in the general terms of the act, which is in the alternative, so that it might embrace the particular interest, or any other interest. The money might be paid into Court, not for the benefit of the party with whom they contracted for a particular interest, but for security, and for the benefit of those entitled to other interests in the land. And the difficulty as to the bond there was, that, although the money appeared to be paid into Court upon both alternatives, in the language of the act, it was made payable to the party on demand, so that there was an inconsistency in the condition of the bond. It did not appear that it was paid in on account of the owner of the land, but on one or other account, and yet it was made payable to him on demand. The objection felt to that condition was, that though the money was payable to one individual, there was nothing to show that that individual was the party entitled” (f).

If *tenants in common* are interested in the lands, it seems that the company should deal with them separately for their respective interests, and that it would be irregular to pay one sum into Court to the joint account of all the tenants in common, or to execute a bond conditioned to pay the compensation to them jointly (g).

Separate bonds should be given to tenants in common.

(f) *Wiley v. South Eastern R. Co.*, 6 Railw. Cas. 100 ; 18 L. J., Ch. 201 ; 1 Macn. & Gord. 58.

(g) *Langham v. Great Northern R. Co.*, 1 De G. & S. 486 ; 5 Railw. Cas. 263 ; 16 L. J., Ch. 437. If the company enter with the consent of the tenant, and do

permanent damage to the lands, the owner may, nevertheless, obtain an injunction and compel the company to make a deposit of money and give the bond required by section 85. *Armstrong v. Whitford and Limerick R. Co.*, 10 Ir. Eq. R. 60.

7. Entry under  
L. C. Act,  
Sect. 85.

Lands in mort-  
gage.

If the lands are in *mortgage*, the company should communicate with the mortgagee as well as with the mortgagor, and if no agreement be made, and the company desire to enter on the lands, they should pay into Court and give bond for a sum of money sufficient to meet all claims which the mortgagee may be entitled to enforce. In a case where a company having notice that lands required by them were mortgaged, and that the mortgage could not be paid off until a certain future day, and the company, nevertheless, merely paid the purchase-money into Court, upon the ordinary valuation to the credit of the mortgagor, and entered upon the lands without negotiating with the mortgagee, Lord Langdale, M.R., decided that the company, not having provided for the expenses of re-investment, or for the costs of the mortgagee, or any compensation for the difference of interest, in pursuance of 8 & 9 Vict. c. 18, s. 114, had wrongfully taken possession of the lands, and he granted an injunction to restrain from prosecuting the works (*h*).

Bond, &c., in  
respect of all  
lands in notice.

And the bond should be given and the deposit made in respect of all the lands described in the notice to treat, for a company cannot, as we have seen, recede from their notice (*i*).

A valid bond  
substituted for  
an invalid one  
will be recog-  
nized in equity.

But it is important to observe, that the *company may give a second bond*, if the first be informal or insufficient, and even amend the description of the lands therein, and make a new deposit; or they may amend a defective proceeding, by causing a jury to be summoned to assess the compensation to be paid for that portion of the lands in respect of which they have not paid a deposit. In all cases of this description, the Court will not grant an injunction against the company, after they have substituted a valid bond, on the ground that the original possession taken under the defective bond is not a taking of possession under the act. In a case where this point was urged before Lord Cottenham, C., he said,—

“There was another objection, that, inasmuch as possession had been taken of this land before the bond was given, it is not a taking possession under the act. It might come to this, that the 85th section could never apply at all, if there was any mistake in the bond. It is impossible to maintain this; and, although this Court has very beneficially interfered to prevent abuses of powers by these great companies, yet there must be something like equity as the foundation for the Court’s interference upon the mere abuse of power, which is the ground for injunction. But here the party is asking, by a construction to be put upon the 85th section, to strike that section entirely out of the act. Now, if the Court finds the means of doing justice between the parties, it will not interfere, except under such rules and provisions as may be equitable for that purpose; and the

(*h*) *Ranlen v. East and West India Docks*, 12 Beav. 298; 19 L. J., Ch. 153. As to right of mortgagees to compensation for goodwill, see *Pile v. Pile*, L. R., 3 Ch. D. 86.

(*i*) Ante, p. 175; *Barker v. North Staffordshire R. Co.*, 5 Railw. Cas. 401; 2 De G. & S. 55; *Giles v. London, Chatham and Dover R. Co.*, 30 L. J., Ch. 608.

Court, therefore, will not deal with an injunction otherwise than for the purpose of seeing that each party has that to which each party is entitled. Here is possession erroneously taken; it is supposed erroneously taken, because the provisions of the bond are not according to the act; but in *Poynder v. Great Northern R. Co.*, possession was also taken under a bond, which I thought was not within the provisions of the act. In that case, however, I dealt with the possession (whether taken *de novo*, or to be continued in the hands of the company, not being material) as a possession under the provisions of the act. The company giving the owner of the land all the benefit the act intended he should have, the Court did not treat the possession as not according to the provisions of the act, but dealt with it as being within the act itself. I consider that not only as correct under the terms of the act, but as a point upon the act decided in that, and, I believe, in other cases" (k).

It seems that in cases under s. 85, or in other cases where a company enter into possession before payment, interest upon the compensation money is to be calculated not from the time of ascertaining the amount, but from the time of entering into possession (l).

Whenever objections are made on the ground that the proceedings of the company are irregular, a landowner, who complains of the insufficiency of the bond, deposit or other proceeding under the statute, should state the whole of his case in the first instance. Thus, where the original objection was that the company had given an informal bond, and had proceeded to enter upon part only of certain lands contained in a notice, Lord Cottenham, C., refused to grant an injunction, where, in a later stage of the proceedings, the landowner set up a new ground of equity, viz., that the company were bound to take the whole of a manufactory, by virtue of 8 & 9 Vict. c. 18, s. 92 (m).

Interest

All objections intended to be relied upon must be taken in the first instance.

### 8. Unpaid Vendor's Right of Lien and Remedies to enforce it.

The remedies given by the Land Clauses Act do not deprive an unpaid vendor of his right to a lien on the land, to enforce which he may bring his action and obtain a decree for sale and the appointment of a receiver (n). A special act, passed after such a decree,

8. Lien of Unpaid Vendor.

Unpaid vendor may obtain sale.

(k) *Wiley v. South Eastern R. Co.*, 1 Macn. & Gord. 58.

(l) *Rhys v. Dare Valley R. Co.*, L. R., 19 Eq. 93. As to interest where amount ascertained but possession delayed, see *Eccleshall Local Board, In re*, L. R., 13 Ch. D. 365, and ante.

(m) *Barker v. North Staffordshire R. Co.*, supra, note (k); ante, s. 4.

(n) *Walker v. Ware, &c. R. Co.*, 35 L. J., Ch. 94; L. R., 1 Eq. 195; *Corans v. Bognor R. Co.*, 36 L. J., Ch. 104; *Pell v. Northampton and Banbury R. Co.*, 36 L. J., Ch. 519; L. R., 2 Ch. 100; *Sedg-*

*wick v. Watford and Rickmansworth R. Co.*, 36 L. J., Ch. 379; *Wing v. Tottenham, &c. R. Co.*, L. R., 3 Ch. 710; 37 L. J., Ch. 654; *Munn v. Isle of Wight R. Co.*, L. R., 6 Ch. 414; 39 L. J., Ch. 522. The lien extends to compensation for damage by severance, and to land adjoining the land purchased. *Walker v. Ware, &c. R. Co.*, ubi supra. Where a day is fixed by the contract of purchase, the money must be paid by that day, or the land delivered up. *Sutton v. Hoylake R. Co.*, 20 L. T. 214.



8. Lien of Unpaid  
Tender.

and restrain  
running of  
trains, but not  
before decree or  
sale.

*Munns v. I. of  
Wight R. Co.*

Sale of land.

*Munns v. I. of  
Wight R. Co.*

Rights of public  
disregarded.

and handing over the line of the purchasing company to be worked by another company, has been held not to interfere with the lien (o). But the Court will not appoint a receiver or restrain the running of trains before decree (p), nor will it restrain the running of trains before the sale (q). The leading case on this branch of the subject is *Munns v. Isle of Wight R. Co.* (r). In that case the plaintiff sold land to the company in 1863, and possession was taken shortly afterwards. About half the purchase-money, notwithstanding the opening of the railway, remaining unpaid, the plaintiffs in 1869 obtained a decree for specific performance. The company filed a scheme of arrangement, and asked the plaintiff to accept debenture stock or a rent-charge in lieu of payment. This he declined to do, and applied again to the Court for relief. James, V.-C., ordered the land to be sold, notwithstanding the scheme, and restrained the running of trains until sale or payment. Giffard, L.J., varied this order, but merely on the ground that the injunction would make the land useless, and distinctly affirmed the principle that the claims of the public to use the railway as a highway might be disregarded. In giving judgment, Giffard, L.J., said,—

“I cannot have any doubt whatever but that the thing which is directed to be sold is the land freed and discharged from any conceivable claims on the part of the company, and from any conceivable claims on the part of the public as claiming through the company. That question has been considered several times by the Court, and the rule was laid down, though not carried to its full extent, in *Wing v. Tottenham and Hampstead Junction R. Co.*” (s).

After reviewing the cases, the learned judge proceeded,—

“When we consider the relative positions of vendor and purchaser, we see that both have an interest in the property, so that each has a right to say that it shall not be put in such a state as that no one can use it. The fact is, that in that state of things it ought to be so dealt with as to make it of advantage to the parties; that is, not of advantage to the purchaser exclusively, nor to the vendor exclusively, but so that if there be profit capable of being made, as distinct from the mere use of the property by the insolvent purchaser, who can pay nothing, that profit ought to be made. I shall in this case discharge the order for an injunction, which I consider inconsistent with the authorities, and, in some measure, principle, and instead of it I shall direct the appointment of a receiver, and shall direct the defendants at once to let the receiver into possession.”

And the appointment of a receiver was accompanied by a direction for sale (t).

(o) *St. Germans (Earl) v. Crystal Palace R. Co.*, L. R., 11 Eq. 568. And see *Griffith v. Cambrian R. Co.*, 21 L. T. 290.

(p) *Latimer v. Aylesbury and Buckingham R. Co.*, L. R., 9 Ch. D. 385—C. A.

(q) *Munns's case*, ubi supra; *Lycett v. Stafford, &c. R. Co.*, L. R., 13 Eq. 261; 41 L. J., Ch. 474.

(r) L. R., 5 Ch. 414; 39 L. J., Ch. 522; varying order below, L. R., 8 Eq. 653.

(s) L. R., 3 Ch. 740; and see *Allgood v. Merrybent and Darlington R. Co.*, L. R., 38 Ch. D. 571, and p. 195, note (b), post.

(t) See further as to the direction for sale, *Williams v. Aylesbury and Buckingham*

An unpaid vendor may bid at the sale of the land by auction (*u*), and would seem to have the same rights as an unpaid vendor generally. But he has no lien for the costs of the arbitration by which the price was settled (*x*), nor, where a rent-charge was the consideration for the sale, for the unpaid arrears of such rent-charge (*y*). Where the line of the purchasing company is worked by another company under a traffic agreement, the proper course is to make both companies parties to the action (*z*). Debenture holders, if they have obtained the appointment of a receiver, should also be made parties (*a*).

Unpaid vendor may bid at sale.

In a recent and peculiar case an unpaid vendor having obtained an order for payment of purchase money, obtained in default of compliance, on evidence that the land was unsaleable, an injunction to restrain a company from running trains over the railway, and from continuing in possession of the land (*b*).

Restraint of running of trains.

### 9. Procedure to assess Compensation.

The next subject for our consideration is, the *manner of proceeding to have compensation assessed*, after the company have thus taken possession of lands without the consent of the owner, under the 85th section.

9. Procedure to assess compensation.  
Mode of proceeding to obtain compensation.

It was at one time doubtful whether the onus of taking the initiative steps to have the purchase-money and compensation assessed lay upon the owner of the lands or upon the company; but Lord Cottenham, C., decided (*c*), that under the 68th section, the onus lay upon the owner. That learned judge said, he was of opinion that this section was intended to cover every case in which the company, whether by right or wrong, or by any other means, had got into possession of property for which they had not paid, or in the exercise of the powers of the statute had injuriously affected the property of others, for which injury they were bound to make compensation. In all cases falling within the section, the company, being in possession, and not having paid the compensation, were not left to their own

After the company have taken possession of lands, the onus of proceeding to the assessment of the compensation lies on the owner.

*ham R. Co.*, 28 L. T. 547, in which the land was put up for auction but not bid for, and a re-sale by auction or private contract ordered.

(*u*) *Ib.*

(*x*) *Herrera (Earl) v. Stafford, &c. R. Co.*, L. R., 13 Eq. 524; 41 L. J., Ch. 362; 28 L. T. 652.

(*y*) *Jersey (Earl) v. Briton Ferry, &c. Co.*, L. R., 7 Eq. 409.

(*z*) *Bishop of Winchester v. Mil Mounts R. Co.*, L. R., 5 Eq. 17; 37 L. J., Ch.

379; *Marling v. Stowhouse and Nailsworth R. Co.*, 38 L. J., Ch. 306; *Stowford v. Same Co.*, *ib.* 307.

(*a*) *Drax v. Somerset and Dorset R. Co.*, 38 L. J., Ch. 232.

(*b*) *Allgood v. Merrybent and Darlington R. Co.*, L. R., 33 Ch. D. 571; 65 L. J., Ch. 743; 35 W. R. 180, per Chitty, J.

(*c*) *Adams v. London and Blackwall R. Co.*, 2 Macn. & Gord. 118; 19 L. J., Ch. 577; 6 Railw. Cas. 271.

9. Procedure to  
obtain  
Compensation.

discretion, or to the pressure of their own wants, to induce them to summon a jury; but a remedy, prompt and effectual, was given to the owners to compel them to do so. This remedy was, to make a claim pursuant to the 68th section, stating the amount of compensation required, and if the company did not enter into an agreement to pay or proceed to arbitration, or within twenty-one days issue their warrant for a jury, as the case might be, they became liable to pay the sum claimed.

This decision was subsequently received with approbation in the Court of Queen's Bench (*d*), and it may now be taken as settled law that the owner may, in all such cases, avail himself of the simple remedy of an action for obtaining compensation from the company, and he seems to have this remedy in addition to his right to a mandamus.

It seems that under sect. 68 no notice need be given by company of their intention to issue a warrant.

Questions have arisen as to whether the various clauses in the Lands Clauses Consolidation Act, which refer to the proceedings before arbitrators and juries, and which are embraced in a series of sections relating to these subjects (*e*), are applicable to cases arising on the 68th section, as well as to ordinary cases. The Court of Queen's Bench determined that sect. 38, which requires the company to give ten days' notice of their intention to cause a jury to be summoned, does not apply to a proceeding under sect. 68 (*f*), and a plea in answer to an action brought on that section was held to be sufficient, wherein the company alleged that they issued a warrant within twenty-one days after the receipt of the plaintiff's notice that he desired to have the question of compensation settled by a jury, without adding that they had given the plaintiff any notice of their intention to do so (*g*). On the other hand, it was decided in the Exchequer Chamber, affirming a decision in the Court of Common Pleas, that sects. 51 and 52, which provide for the payment of the costs of an inquiry before a jury, are incorporated with sect. 68 (*h*), and that a party who claimed compensation, having demanded a jury, and recovered a larger sum than the company had

But the provisions as to costs apply to sect. 68.

(*d*) *Doc d. Arncliffe v. North Staffordshire R. Co.*, 20 L. J., Q. B. 249; 15 Jur. 944; 16 Q. B. 526.

(*e*) See these sections and the cases thereon, post, Chap. VI., "On the Mode of Assessing Compensation."

(*f*) This decision is the more important, inasmuch as it shows that the claimant will have no opportunity of requiring a special jury, unless he demands one in his original notice, when he requires the compensation to be settled by jury.

(*g*) *Railstone v. York, Newcastle and Berwick R. Co.*, 15 Q. B. 404; 19 L. J., Q. B. 464. Coleridge, J., diss. In *Richardson v. South Eastern R. Co.*, 11 C. B.

154; 2 L., M. & P. 409; *S. C.* in error, 21 L. J., C. P. 123; 16 Jur. 151; 15 C. B. 810, some of the judges intimated doubts as to this decision. But it was approved of and followed in *Hayward v. Metropolitan R. Co.*, 33 L. J., Q. B. 73; 4 B. & S. 787. See also *Healey v. Thames Valley R. Co.*, 5 B. & S. 769; 34 L. J., Q. B. 52.

(*h*) *South Eastern R. Co. v. Richardson*, 21 L. J., C. P. 122; 16 Jur. 151; 15 C. B. 810; *Richardson v. South Eastern R. Co.*, 11 C. B. 154; 20 L. J., C. P. 236. See *Hayward v. Metropolitan R. Co.*, *ubi supra*.

previously offered, was therefore entitled to recover the costs of the proceedings. The Court said, on affirming the judgment, "It is not necessary for us to say whether we concur in the opinion of the Court of Common Pleas, that *Railstone v. York and Berwick R. Co.* was wrongly decided, for that case may be good law and yet the decision in this case may be also correct."

It is also to be observed, that a party cannot take proceedings under the 68th section, unless his lands have been *actually* taken, or *actually* injuriously affected. If, therefore, a company give notice of their intention to take lands, but do not afterwards actually take possession or injuriously affect them, but refrain altogether from taking any steps to carry out their intention, the remedy of the owner is to apply for a writ of mandamus to compel the company to assess the purchase-money and compensation. It has been decided, that the owner or other party injured cannot in such a case make a demand of a certain sum, under the 68th section, and afterwards bring an action to recover the amount demanded on the default of the company to issue a warrant to the sheriff (i).

The Court of Exchequer said on this point,—

"The question here is, what is the meaning of the words 'lands taken for the execution of the works?' For it is to such lands alone that the clause applies. It has been determined upon several occasions by Lord Cottenham, and, independently of his high authority, we entirely concur in that opinion, that when a company, as here, give notice to a party that they require his lands for their works, it amounts to an agreement by them for the purchase of those lands, *assented to by the opposite party (k)*, on the terms of making the compensation in the way appointed by the act, under which such notice is given, and *binds both parties finally*. In some sense, therefore, lands upon such notice being given, may be described as lands taken for the execution of the works. And so in one case the Court of Queen's Bench called them, and we think correctly. But the point is, whether the 'lands taken,' in the 68th section, mean lands actually taken into the possession of the company, and those alone; and after carefully considering the various clauses of the act preceding the 68th section, we have arrived at the conclusion that this is the correct construction. These preceding provisions really exhaust the whole of the cases in which the company gives notice of requiring the lands of the owners adversely, when the company requiring them are not in the possession of the lands, and can only obtain that possession upon payment of the ascertained compensation. But another class might exist and require to be provided for, in which the above provisions could not be applied, and that was the class where the company had been permitted to take possession without any distinct agreement for compensation, or where, in the execution of their works, injury, not originally in the contemplation either of the company or of the owners, was actually incurred. And the literal meaning of the words 'lands which shall have been taken, or shall have been injuriously affected,' not 'lands

Lands need to be actually taken or injuriously affected to have a right to take an action.

Judgment of the Court of Exchequer on this point. *Burkinshaw v. Birmingham and Oxford Junction R. Co.*

(i) *Burkinshaw v. Birmingham and Oxford Junction R. Co.*, 5 Exch. 476; 20 L. J., Ex. 247. But see *Barker v. Metropolitan R. Co.*, 17 C. B., N. S. 785.

(k) See as to the words in italics, *Haynes v. Haynes*, 30 L. J., Ch. 578; 1 Dr. & Sm. 420; ante, p. 176.

9. Procedure to assess Compensation.

which shall be taken, or shall be injuriously affected,' clearly, we think, points to this class alone. Independently therefore of the argument, not an unimportant one, that the construction contended for would not give full effect to both the 23rd and 68th sections, but make them in some degree inconsistent, we have come to the conclusion that upon the true construction of the 68th section, the words 'lands taken,' &c., include only lands actually taken or actually affected by the company, and consequently that these lands, not having been so taken, this action cannot be sustained against the defendants."

No injunction lies if lands are injuriously affected by works on the company's own lands.

It is also important to observe, that where lands *are* actually injuriously affected by the company, in consequence of works in the course of construction on their own lands, or on the lands of other parties not complaining, the party sustaining the injury cannot obtain an injunction on the ground that he has received no notice, and no offer of compensation, if it appears that the company are only exercising the statutory powers entrusted to them. In cases of this description the claimant should allow the works to be completed, and then take proceedings under the 68th section (1).

On this subject Sir J. Wigram, V.-C., said,—

Lands injuriously affected by works on the company's own lands.

*Hutton v. London and South Western R. Co.*

"One question to be answered was, whether it was lawful for the company to commence those works before they had made compensation. The Court would not interfere to restrain companies from executing their lawful powers, unless there was some special equity to the contrary, arising out of some agreement or circumstances. If the lawful powers were not exceeded, the court would not interfere. The question here must be answered by the Lands Clauses Consolidation Act, and the Railways Clauses Consolidation Act. In the case of the purchase of land, the 84th section of the former act provided that the price was to be paid before entry, and the 85th section provided for cases where the company, wanting immediate possession, and before the time of payment, were allowed, upon having the amount ascertained in the mode pointed out by the act, paying the money into the Bank, and giving a bond, to enter upon the land before the price was actually paid. Those were the important clauses as applicable to the present case. But the case of damages, consequential upon the exercise of the powers of the company upon their own land, or upon the land of other persons not complaining, might stand in a different position from that of damages which were consequential on a purchase, and must be determined by the Railways Clauses Consolidation Act. That act required the company to make compensation to all persons whose interests were injuriously affected by the acts of the company. There was some difficulty arising out of the language of several of the clauses of this act in construing them so as to bring every case within them. Several sections of that act had reference to the question of compensation. The question in this cause arose under the 44th section which said the company should make compensation, and that the amount of compensation or damages

(1) It was objected in *Langham v. Great Northern R. Co.*, 1 De Gex & Sm. 486; 5 Railw. Cas. 263; 16 L. J., Ch. 437, that the company, in executing their works, would greatly alter the appearance of the land (which the company had entered upon under sect. 85), and that a jury would not

be likely to assess sufficient compensation to the owner, if they were called upon to give a verdict, after the damages were sustained, but Knight Bruce, V.-C., said, this was no ground for the interference of equity.

should be ascertained in the way pointed out by the Lands Clauses Consolidation Act, but did not say whether the damages should be ascertained before the company began the work upon their own land, or at any time afterwards. In *Lister v. Lobley* (m), the judges were unanimously of opinion that it was not unlawful for a company to commence works (provided they were within their powers), although they might be attended with damage to others, before making or tendering compensation for expected damage. That case was an authority in point. The ground upon which the Court there proceeded was the impracticability of knowing, in many cases, whether damage would or would not be sustained from the unlawful acts of the company; and, if it was certain that damage would follow, the difficulty of measuring the extent of it. Upon carefully reading through the Railways Clauses Consolidation Act, it will be found that, in many of the cases specified, it would be absolutely impossible for a jury to measure the damages which a company might be bound to tender before the work was commenced. To such cases the reasoning of *Lister v. Lobley* was applicable, and was unanswerable" (n).

Works may be commenced before compensation.

If the claimant proceeds against the company under the 68th section, the company may allege as a defence, to an action on the award or inquisition, that the claimant has sustained no injury for which the statute has given compensation (o).

It is a good defence to an action on s. 68, that no damage has been sustained.

Arbitrators and juries have no jurisdiction to determine whether damages alleged to have been sustained are such as give a legal right to demand compensation (p). If no such damage has, in fact, been sustained, the company will not be damnified by refusing to summon a jury, or appoint an arbitrator when they are required to do so. But as exorbitant claims may be made under sect. 68, in cases where the legal right to compensation may be extremely doubtful, and the company would become liable to pay the whole of the claim, on failing to establish that no legal damage had been sustained, in such cases the proper course seems to be, that the company should take the necessary steps to have the compensation assessed; and then appear before the arbitrators or jury, under protest, if necessary, and contest the claim (q).

(m) 7 A. & E. 124.

(n) *Hutton v. London and South Western R. Co.*, 7 Haro, 259; 18 L. J., Ch. 345. And see *Ferrand v. Corporation of Bradford*, 21 Decr. 412; *Macey v. Metropolitan Board of Works*, 33 L. J., Ch. 377, 383.

(o) See *Glover v. North Staffordshire R. Co.*, 20 L. J., Q. B. 376; 16 Q. B. 912; *Read v. Victoria Station, &c. R. Co.*, 32 L. J., Ex. 167; 1 H. & C. 826; *Darber v. Nottingham and Grantham R. Co.*, 33 L. J., C. P. 193; 15 C. R., N. S. 276; *Beckett v. Midland R. Co.*, L. R., 1 C. P.

241; 35 L. J., C. P. 163; H. & Rath. 189. The proceedings will not be stayed on this ground, as they would not have been "restrained" by a court of equity before the Judicature Act. See *Plarlin v. London and Blackwall R. Co.*, 1 K. & J. 34; 5 De G., M. & G. 851, and the cases there cited.

(p) *Beckett v. Midland R. Co.*, *ubi supra*.

(q) *Read v. Victoria Station, &c. R. Co.*, *ubi supra*.

10. *Temporary  
Occupation of  
Lands.*

10. *Powers to take temporary Possession of Lands.*

The company are also authorised to take temporary possession of lands which abut on the intended line of railway; but this power is confined within certain specified limits, and mansion-houses and other inclosed property are protected from such an invasion.

R. G. Act, s. 32  
Entry without  
payment.

By sect. 32 of the Railways Clauses Act, 1845, it is enacted, that, subject to the provisions therein and in the special act contained, the company may, at any time before the expiration of the period limited for the completion of the railway, without making any previous payment, enter upon any lands within the prescribed limits, or, if no limits be prescribed, not being more than 200 yards distant from the centre of the railway, and not being a garden, "belonging to a house, nor a park," and not being nearer to the mansion-house of the owner of any such lands than the prescribed distance, or, if no distance be prescribed, then not nearer than 500 yards therefrom (r), and may occupy the said lands so long as may be necessary for the construction or repair of that portion of the railway, or of the accommodation works connected therewith, and may use the same for any of the following purposes :—

Saving for garden, &c.

L. C. Act, s. 32.

- For the purpose of taking earth or soil by side cuttings therefrom ;
- For the purpose of depositing soil thereon ;
- For the purpose of obtaining materials therefrom ; or,
- For the purpose of forming roads thereon.

Power to use  
lands.

In exercise of the powers aforesaid, the company may deposit, and manufacture and work upon such lands, materials of every kind used in constructing the railway, and may also dig and take from out of any such lands any clay, stone, gravel, sand or other things useful or proper for constructing the railway or the roads, and may erect thereon workshops, sheds, and other buildings of a temporary nature. But it is provided, (1) that the company is not to be exempted from an action for nuisance or other injury to the lands or habitations of any party other than the party whose lands are taken or used for any of the "purposes aforesaid;" and (2) that no stone quarry, brick-field, or other like place, which, at the time of the passing of the special act, was commonly worked or used for getting materials therefrom for sale, shall be taken or used by the company for "any of the purposes lastly hereinbefore mentioned."

(r) In *Webb v. Manchester and Leeds R. Co.*, 1 Railw. Cas. 599, Lord Cottenham said, when called upon to construe a similar clause in a railway act, "The powers given to companies are so large, and frequently so injurious to the interests of individuals, that I think it is the duty

of every Court to keep them most strictly within these powers; and, if there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers, but they will get none from me by way of construction of the act."

The words "purposes aforesaid" in this section refer only to the purposes mentioned in the section itself. Moreover, the remedy against the company may be by action for injunction as well as for damages. Where a company erected a mortar-mill near the shop of the plaintiff, who complained of the noise and vibration, Jessel, M.R., granted an injunction to restrain the company from working the mill, not being satisfied that the railway could not be constructed without the mortar being made at that particular place (s).

Injunction  
against com-  
pany.

And, by sect. 33,—“In case any such lands shall be required for spoil banks or for side cuttings, or for obtaining materials for the construction or repair of the railway, the company shall, before entering thereon (except in the case of accident to the railway, requiring immediate reparation), give 3 weeks' notice in writing to the owners and occupiers of such lands, of their intention to enter upon the same for such purposes (t); and, in case the said lands are required for any of the other purposes hereinbefore mentioned, the company shall (except in the cases aforesaid) give 10 days' like notice thereof; and the company shall, in such notice respectively, state the substance of the provisions hereinafter contained, respecting the right of such owner or occupier to require the company to purchase any such lands, or to receive compensation for the temporary occupation thereof, as the case may be” (u).

Company to give  
notice previous  
to such tempo-  
rary possession.  
Sect. 33.

The mode of serving the above-mentioned notice is prescribed by sect. 34.

If lands are required for spoil banks, &c., the owner or occupier may, by giving notice in writing to the company within ten days after he has received the notice from the company, object to the company using the lands; and the objection may be, that the lands or materials are essential to be retained by the owner (v), or that other contiguous lands would be more fitting to be used (y) : (Sect. 35.) If the former objection be made, two justices may inquire into the truth of such ground of objection, and, for special reasons to be assigned, may order that the lands shall not be used by the company; and, after service of the justices' order on the company, they cannot take or use, without the previous consent of the owner, any of the lands or materials which they are ordered not to take or use : (Sect. 36.) If the objection be, that other contiguous lands which the company are authorised to use, would be more fitting to be used, then the owners and occupiers of such contiguous lands, and the company, may be

Owner, &c., may  
object to lands  
being used for  
temporary pur-  
poses.  
Sect. 35.

(s) *Fenwick v. East London R. Co.*, L. R., 20 Eq. 544; 44 L. J., Ch. 602.

(t) The notice ought to point out for what purposes the lands are required, as in the form, Appendix. *Poynder v. Great*

*Northern R. Co.*, 5 Railw. Cas. at page 201; 10 Sim. at page 19.

(u) See forms, vol. II.

(v) See forms, vol. II.

(y) See forms, vol. II.



10. *Temporary  
Occupation of  
Lands.*

summoned to appear before two justices, and they may determine, summarily, which of the lands shall be used: (Sect. 37.) Or the justices may adjourn the inquiry, and summon any other person who may appear to have lands which the company are authorized to take, and then finally determine which lands shall be used: (Sect. 38.) The owner or occupier of lands required for spoil banks, side cuttings, for obtaining materials, or for forming roads, may require the company to execute a bond, with sureties, conditioned for the payment of compensation; and a justice may decide any difference as to the amount of the penalty, &c.: (Sect. 39.) Before any lands or roads can be used, the company are required, on the request of the owner or occupier, to fence off the lands and roads, and to put up convenient gates; and, in case of difference, two justices may decide what fences and gates are necessary: (Sect. 40.) If lands are taken for the purpose of getting materials, the company must work the same in such manner as the surveyor or agent of the owner may direct, or, in case of disagreement, as a justice may direct: (Sect. 41.) In all cases where the company enter upon lands to make spoil banks, the owners or occupiers of the lands, or parties having such interests therein as, under Lands Clauses Act, would enable them to convey the lands to the company, may, at any time during the possession of such lands by the company, and before they have accepted compensation from the company in respect of such temporary possession, serve a notice in writing on the company (z), requiring them to purchase the lands, or their interests therein. The notice must set forth the particulars of the interest in the lands, and the amount of the claim in respect thereof. The company are then bound to purchase: (Sect. 42.)

Owners may, in certain cases, require the company to purchase lands required for temporary purposes.  
Sect. 42.

Compensation for temporary occupation.  
Sect. 43.  
Crops.

In any of the cases where the company are not required to purchase the lands, and in all other cases where they take temporary possession of lands by virtue of the powers in the acts granted, it is incumbent on the company, within one month after their entry upon such lands, upon being required so to do, to pay to the occupier of the lands the value of any crop or dressing that may be thereon, as well as full compensation for any other damage of a temporary nature, which he may sustain. The company must also, during their occupation, pay half-yearly to the occupier or owner, as the case may require, a rent to be fixed by two justices, in case the parties differ; and within six months after they cease to occupy, pay to the owner and occupier compensation for all permanent or other injury that may have been sustained by them: (Sect. 43.)

(z) See forms, vol. II., "Statutes," &c., n.

The amount of compensation in all the above-mentioned cases is determined, and the money applied, in the manner provided by the Lands Clauses Consolidation Act for determining the amount and application of the compensation to be paid for lands taken under the provisions of that act: (Sect. 44.) This subject is treated of in the next Chapter. The right of the owner or occupier of lands to compensation for temporary occupation is not affected by the subsequent abandonment of the railway (*a*).

After a railway is completed, a company may, in certain cases, enter on adjoining lands for the purpose of preventing accidents and of repairing the railway; and in some cases lands not included in the schedules annexed to the special act may be taken under the compulsory powers of the act; but in all these cases a certificate from the Board of Trade must be obtained by the company in accordance with 5 & 6 Vict. c. 55, ss. 14 and 15 (*b*).

*Entry on lands to repair accidents, &c., by the authority of the Board of Trade.*

#### 11. *Powers to take temporary Possession of Roads.*

The company are also authorized to make a temporary use of certain private roads. By sect. 30 of the Railways Clauses Act, 1845, it is enacted that the company may enter upon and use "any existing private road, being a road gravelled or formed with stones or other hard materials, and not being an avenue or a planted or ornamental road, or an approach to any mansion house" within certain prescribed limits; but, before the company can enter upon or use the road, they must give 3 weeks' notice (*c*) of their intention to the owners and occupiers of the road, and of the lands over which it passes. The notice must state the time during which, and the purposes for which, they intend to occupy such road; and such compensation must be paid as may be agreed upon, or, in default of agreement, as settled by two justices.

*11. Temporary Occupation of Roads.*

*Powers to take temporary possession of private roads within 500 yards of line.*  
R. C. Act, s. 30.

*Notice to owner.*

But the owners and occupiers may, within ten days after service of the notice, object to the company making use of the road on the ground that other roads or some public road would be more fitting to be used; and, upon the objection being so made, such proceedings (*mutatis mutandis*) may be had as have been already mentioned,\* with respect to lands temporarily occupied by the company, in respect of which three weeks' notice is required to be given:

*Power to owners to object that other roads should be taken.*  
Sect. 31.

*Page 200, ante.*

(*a*) "Railway Companies Act, 1867,"  
30 & 31 Vict. c. 127, s. 33.

(*b*) See post, Chap. X., Sect. 8.

(*c*) See form, vol. II., "Statutes," n.

11. *Temporary Occupation of Roads.*

Substitution of roads for roads interfered with.  
Sect. 53.

(Sect. 31.) The powers given to the company to cross turnpike and other roads are hereafter described (*d*).

If the company cross, raise, cut through, sink or use any part of any road, public or private, so as to render it impassable for, or dangerous, or extraordinarily inconvenient, to passengers or other persons, or carriages, they must, before the commencement of any operations, cause a sufficient road to be made, instead of the road to be interfered with, and maintain such road (*e*): (Sect. 53.) In default of making the substituted road, the company are liable to a heavy penalty (*f*) (sect. 54); and may also be sued by any person sustaining special damage: (Sect. 55.) If the road interfered with as above mentioned can be restored, compatibly with the formation and use of the railway, the company must restore it; if it cannot be restored, then the company must cause some other sufficient substituted road to be put into a permanently substantial condition; and the former road must be restored, or the substituted road provided, within a certain period, which is prescribed: (Sect. 56.) If any such road be not restored, or the substituted road completed, within the prescribed period, the company forfeit to the managers or owner of the road (*g*) interfered with, 5*l.* for every day during which the road is not restored, or the substituted road completed: (Sect. 57.)

Restoration of roads.  
Sect. 56.

Penalty for not restoring road.

Repair of roads.  
Sect. 58.

Penalty for non-repair.

If the company use or interfere with (*h*) any road, they must from time to time make good all damage done; and any question as to the damage done, or as to the repair of the road by the company, must be referred to two justices, who may direct such repairs to be made as they think reasonable, and may impose upon the company for not executing the repairs a penalty, not exceeding 5*l.* per day (*i*), to be paid to the surveyor or other person having the management of the road, if public, or to the owner, if private: (Sect. 58.)

(*d*) Post, Chap. IX., Sect. 3.

(*e*) See *Attorney-General v. Wilnes R. Co.*, 30 L. T., 449, and other cases on this subject, post, Chap. IX., Sect. 7.

(*f*) See *Mann v. Great Southern and Western R. Co.*, 9 Ir. C. L. R. 105. If a private way be obstructed by the railway works, the remedy of the party injured is to sue for a penalty, under sect. 54, or to bring an action under sect. 55 of the Railways Clauses Act for special damage sustained, or he may proceed to recover compensation in the manner pointed out in the acts. It is clear that an action on the case for the obstruction cannot be maintained. *Watkins v. Great Northern R. Co.*, 15 Jur. 1127; 20 L. J., Q. B. 391; 16 Q. B. 961, distinguishing *R. v. Scott*, 3 Q. B. 543, where an injunction was refused. See *Hatfield v. Manchester R. Co.*, 12 Jur. 1083. The above sections, however, do not apply where the object of

the special act is to change the nature of the road. *Tanner v. South Wales R. Co.*, 5 E. & B. 618.

(*g*) The owner of the soil of a road, who occasionally repaired it and the sewers below it, and who had dedicated the road to the use of the public, although it had never been adopted or repaired by the parish, is not a person having the management of the road within the meaning of the above clause. *R. v. Wilson*, 21 L. J., Q. B. 281; 16 Jur. 973; 18 Q. B. 848.

(*h*) The company are liable under this section for damage done to a road by their contractors. *West Riding and Grimsby R. Co. v. Wakefield Local Board of Health*, 33 L. J., M. C. 174; 5 B. & S. 478.

(*i*) See a form of an order and conviction, *L. and N. W. R. Co. v. Wetherall*, 20 L. J., Q. B. 337; 15 Jur. 247.

An order of justices, made under the 58th section need not point out the particular repairs required to be done ; it is sufficient to state what length of road has been injured, and to direct that portion to be repaired ; and one conviction for neglecting to obey an order may, by reference to the order, include several roads situate in one parish, and need not impose a separate penalty for the non-repair of each road ; nor is it necessary to refer to the special act in the conviction ; it is sufficient to allege that the conviction is by virtue of the Railways Clauses Consolidation Act (*k*).

Sufficiency of an order and conviction under s. 58.

(*k*) *L. and N. W. R. Co. v. Weltherall*, ubi supra. Whether those portions of a road belonging to a county bridge, and repairable by the county, are within the

provisions of this section, was discussed in *Ex parte Exeter Road Trustees*, 16 Jur. 649.]

## CHAPTER V.

## ON THE PARTIES ENTITLED TO COMPENSATION, AND THE SUBJECT-MATTERS THEREOF.

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1. Compensation.*1. The Subject-matters of Compensation.*

WE now approach the important question of compensation. It will be found that both the Lands Clauses Act and the Railways Clauses Act are replete with allusions to compensation, sometimes giving it in express terms, and sometimes by reference only. Before considering the general enactments on the subject, it will be convenient to group together such of the special enactments relating to it as may be dismissed in a few words.

Special enactments.

Compensation for additional damage where time extended.  
R. C. Act, 1863, s. 20.

It is provided by the Railways Clauses Act, 1863, s. 20, that, where the time limited for the exercise of powers of compulsory purchase, or for construction of the railway is extended, the justices, arbitrators, &c., who award or assess the compensation to be made by the company shall, in estimating the amount of such compensation, assess compensation for the additional damage (if any) sustained by those owners, &c., by reason of the extension of time.

Compensation for damage sustained by temporary occupation of lands.

R. C. Act, 1845, ss. 42, 43.

Compensation for damages sustained by reason of the temporary occupation of lands is, by the Railways Clauses Act, 1845, s. 42, to be made to both the owner and the occupier of the lands. And if the lands have been temporarily occupied for the purpose of making spoil banks or side cuttings thereon, or for obtaining materials for the construction or repair of the railway, then the parties interested may waive their right to claim compensation under the above provision, and require the company to purchase the lands (a).

Compensation where roads are temporarily occupied.  
Sect. 30.

So, when the company use certain existing private roads, before they use such roads, they must give notice of their intention (b), and pay to owners and occupiers such sum for the use of the road as

(a) See the notice, &c. required in this case, vol. II., tit. *Forms*.

(b) See the form of this notice, vol. II., tit. *Forms*.

shall be agreed upon by the owners and occupiers and the company, or, in case they differ, as shall be settled by two justices.

The company are empowered to remove or displace water and gas-pipes; but they must make good all damage done, and make full compensation to all parties for any loss or damage which they may sustain by reason of any interference with the mains, pipes or works of any water or gas company, or with the private service-pipes of any person supplied with water.

Injuries to water and gas-pipes.  
Sect. 21.

The special provisions of the Railways Clauses Act, sects. 77—85, with respect to mines, and of the Lands Clauses Act, sects. 119—123, with respect to lands subject to leases, are treated of in separate sections of this Chapter (c). Compensation for lands omitted to be purchased, and for rights of common, is also treated of hereafter (d).

Mines.  
Lands.

The general enactments on which the right to compensation is founded are the 63rd and 68th sections of the Lands Clauses Act, and the 6th and 16th sections of the Railways Clauses Act. The 68th section of the Lands Clauses Act assumes that certain parties are entitled to compensation in respect of lands or of some interests therein which shall have been taken for or injuriously affected by the works authorized by the special act, and merely points out the various modes by which the compensation is to be ascertained. The 63rd section of the same act had already provided that in estimating compensation regard is to be had "to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands."

Ommission to purchase.  
Rights of common.  
General enactments as to compensation.  
R. C. Act, ss. 63, 68.

The 6th section of the Railways Clauses Act directs that the "company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purpose of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers and other parties by reason of the exercise as regards such lands" of the powers vested in the company. The 16th section of the same act provides that in the exercise of their powers the company shall "make full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers." Lastly, by the interpretation clause of both acts (sect. 3) the word "lands" includes "messuages, lands, tenements and hereditaments of any tenure." Easements are not comprehended in the definition (e), although compensation may be

Damage by severance.

R. C. Act, ss. 6, 16.

"Lands."

Easements.

(c) See as to mines, sect. 4, and as to lands held on lease, sect. 5, post.  
(d) See Chap. VIII.

(e) *Pinchin v. London and Blackwall R. Co.*, 5 De G., M. & G. 91; 21 L. J., Ch. 417.

1. *Compensation.*

obtained if the easement be "injuriously affected" (*f*). And modern special acts, following the analogy of the Public Health Act, 1875, s. 4, have, it is believed, not unfrequently provided specially that "land" shall include easements. The exercise of a right to cross the line of another company has been held not to be a compulsory taking of land within s. 16 of The Lands Clauses Act (*g*).

Where land  
taken.

It is plain that where land is actually taken few questions can arise except with regard to the amount of compensation to which the party interested is entitled, and that, as will be shown presently, is a question of fact and not of law, and to be decided only by the tribunal to which it has been referred by the Legislature, which tribunal may take into account damage by severance, as well as the value of the land to be taken. The principles adopted by surveyors in assessing compensation were considered before a Select Committee of the House of Lords in 1845, and that committee reported (*h*)—

Report of House  
of Lords Com-  
mittee.

"Upon the question of severance and damage, the committee are of opinion that it is impossible to establish any fixed rate upon which the damage arising from severance, and other injuries to property, can be assessed and compensated.

"With respect to the land, &c. actually taken, the witnesses who were examined state, that, to the marketable value of the property taken, they add, in their valuations, a percentage, on the ground of the sale being compulsory. The amount of this percentage varies with the views of the different witnesses, whose evidence will be found in the Appendix; but the committee are of opinion that a very high percentage, amounting to not less than 50% per cent. upon the original value ought to be given in compensation for the compulsion only to which the seller is bound to submit, the severance and the damage being distinct considerations. In some of the evidence it appears to the committee that a very unfair view is taken of the injury done to proprietors, and of the compensation due to them.

"The committee are of opinion that many cases occur in which it is necessary to consider the land, &c., not merely as a source of income, but as the subject of expensive embellishment, and subservient to the enjoyment and recreation of the proprietor.

"Public advantage may require all these private considerations to be sacrificed; but as it is the only ground on which a man can be justly deprived of his property and enjoyments, so, in the case of railways, though the public may be considered ultimately the gainers, the immediate motive to their construction is the interest of the speculators, who have no right to complain of being obliged to purchase, at a somewhat high rate, the means of carrying on their speculation.

"It is to be observed, that the price of the land purchased, and the compensation for that which is injured, form together but a small proportion of the sum required for the construction of a railway, so that no apprehension need be entertained of discouraging their formation, by calling upon the speculators to pay largely for the rights which they acquire over the property of others."

(*f*) *Eagle v. Charing Cross R. Co.*,  
L. R., 2 Q. B. 638; 36 L. J., Q. B. 297.

(*g*) *G. IV. R. Co. v. Swindon and Cheltenham Extension R. Co.*, L. R., 22 Ch. D. 677; 52 L. J., Ch. 306—C. A. (diss.

Cotton, L. J.)

(*h*) The evidence laid before the committee was printed in editions of the work prior to the 6th.

There may be a damage by severance within the meaning of the 63rd section of the Lands Clauses Act, 1845, although the lands be not physically contiguous. This section applies to lands connected together in use as regards the purpose to which they are applied by the owner. Therefore, where part of a rifle range was occupied under two different tenures, and only part was taken, the lessees were held entitled to recover for damage to the rifle range generally (i). Prospective value may be taken into account, as that the portion severed was valuable for building purposes (k). And it is at least doubtful whether a severance does not exclude the operation of the leading restrictive rules as to compensation which are hereafter stated (l).

Damage by severance.

Prospective value.

Upon the meaning of the term "injuriously affected" very great discussion has arisen from time to time. Before passing in review the decisions upon the subject, it may be as well to lay before the reader the following body of general rules.

"Lands injuriously affected."

## 2. General Rules as to Compensation.

2 General Rules as to compensation.

*Rule 1.*—The act for which compensation is claimed must be done in the lawful exercise of the statutory powers of the company (m).

*Rule 2.*—The damage in respect of which compensation is claimed must be such damage to the land itself or to some interest therein as would have been actionable damage if it had not been done in the exercise of such powers (n).

*Rule 3.*—The damage must arise by reason of the construction of the railway, and not by reason of the working of the railway when completed (o).

(i) *Holt v. Gastlight and Coke Co.*, L. R., 7 Q. B., 728; 41 L. J., Q. B. 351.

(k) *Key. v. Brown*, L. R., 2 Q. B. 630; 30 L. J., Q. B. 323; 8 B. & S. 456.

(l) See *Stockport, &c. R. Co., In re*, 33 L. J., Q. B. 251, and p. 226, post.

(m) *Braulbert v. Imperial Gas Co.*, 7 H. L. C. 600; *Rickett v. Metropolitan R. Co.*, L. R., 2 H. L. 175, and p. 212, post.

(n) *Rickett's case*, *ubi supra*. It is submitted that the converse proposition—that all damage to the land which would have been actionable is the subject of compensation—is correct in principle. The dicta are conflicting. Lord Cranworth in *Ogilby's case*, 2 Macq., at p. 235 (p. 225, post), and Lord Chelmsford in *M'Carthy's case*, L. R., 7 H. L., at p. 256 (p. 216, post), pronounce against the proposition; but Lord Penzance in *M'Carthy's case*, L. R., 7 H. L., at p. 262 (p. 219, post), pronounces for it.

The case, put by Lord Cranworth, of level crossings, seems within the 3rd rule.

(o) *Hammersmith R. Co. v. Brand*, L. R., 4 H. L. 171, and p. 231, post; *City of Glasgow Union R. Co. v. Hunter*, L. R., 2 Sc. App. 78. As to whether this rule is subject to exception where lands are taken, see *Stockport, &c. R. Co., In re*, 33 L. J., Q. B. 251, and p. 226, post. As to *locus standi* to petition against the bill, see *Metropolitan and St. John's Wood Railway Bill*, 2 Clifford and Stephens, 189. In that case, an act authorized an underground railway, but restricted the traffic to passenger trains. An extension bill proposed to remove the restriction. Two hundred and fifty neighbouring owners were allowed a limited *locus standi* against the clause proposing to repeal the restriction, although their land had not been taken.



2. *General Rules  
as to Compensation.*

These rules may be considered to be settled by decisions in the House of Lords, which it is not proposed to criticise (*p*). It may be mentioned, however, that the second and third rules were dissented from by Lord Westbury and Lord Cairns respectively; and that Lord Westbury (*q*), though concurring with a subsequent decision of the House of Lords applying them, emphatically repeated his dissent, and stated that "the decisions had introduced into the subject two vicious and erroneous conclusions." None of the decisions have been followed, or attempted to be followed, by any general legislative action. Important special legislation, however, has taken place. The Metropolitan Inner Circle Act, 1874, contains two sections framed to meet cases within the second and third rules. By one of these sections "proper compensation" was to be made for structural injury arising from the working of the railway within three years after its construction. By the other, "proper compensation" was to be made for injury to trade by obstruction of access or decrease of traffic, whether temporary or permanent (*r*).

The further rules appended may also be taken to be well settled, although they have not received the direct sanction of the House of Lords. These are—

*Rule 4.*—The works may be commenced before compensation is paid or the amount assessed (*s*).

*Rule 5.*—The assessing tribunal has no jurisdiction to entertain the question of right to compensation, but can only determine the amount (*t*).

*Rule 6.*—The assessing tribunal may take into account all damage, both present and prospective, which comes within the category of the first three Rules (*u*).

*Rule 7.*—The assessing tribunal may not take into account, by way of set-off on behalf of the company, any benefit which accrues to the claimant by reason of the execution of the works (*x*).

*Rule 8.*—When once the right to compensation is admitted or proved, the Court will not interfere with the finding of the assessing tribunal on the ground of insufficiency (*y*) or excess, though it has

(*p*) See *Ricket's case* criticised in Lloyd on Compensation, p. 113.

(*q*) In *City of Glasgow Union R. Co. v. Hunter*, L. R., 2 Sc. App., at p. 85.

(*r*) 37 & 38 Vict. c. cxcix., ss. 39, 40.

(*s*) *Hulton v. London and South Western R. Co.*, 7 Haro, 259; *Macey v. Metropolitan Board of Works*, 33 L. J., Ch. 377. The rule was first laid down in *Lister v. Lobley*, 7 A. & E. 124. It does not apply where lands are actually taken.

(*t*) *R. v. L. and N. W. R. Co.*, 3 E. & B. 448, as to a jury, diss. Erle, J.; *Bran-*

*don v. Brandon*, 34 L. J., Ch. 333; *Re Harper*, L. R., 20 Eq. 30; 41 L. J., Ch. 512, as to arbitrators.

(*u*) *Ripley v. Great Northern R. Co.*, L. R., 10 Ch. 435.

(*v*) *Senior v. Metropolitan R. Co.*, 32 L. J., Ex. 225; per Bramwell and Wilde, BB. The subsequent overruling of the case in *Ricket's case*, *ubi supra*, does not affect this point.

(*y*) *R. v. L. and N. W. R. Co.*, 3 E. & B. 448; *Mortimer v. South Wales R. Co.*, 23 L. J., Q. B. 129; 1 E. & E. 375.

jurisdiction to insist on the proper measure of compensation (e), and to set aside a finding on the ground of remoteness of damage (a).

*Rule 9.*—Compensation is assessed once for all in respect of damage possible to be foreseen at the time of assessment and the claimant can make no further claim in respect of such damage (b).

*Rule 10.*—Where the consent of a public body is required to the manner of executing the works, such public body is, notwithstanding the giving of the required consent, entitled to compensation for the taking of land vested in it (c).

### 3. Review of the Cases.

#### 3. Review of Cases.

The first of the general rules as to compensation, that *the act for which compensation is sought must be a lawful one*, was spoken of as already established in *Caledonian R. Co. v. Coll.*

"It is well settled," said Lord Campbell in that case (d), "that the statutory tribunal, which the Legislature has provided where losses are sustained in the formation of railways, is only established to give compensation for losses sustained in consequence of what the railway company may *do lawfully* under the powers which the Legislature has conferred upon them; and that for anything done *in excess* of those powers, or *contrary* to what the Legislature in conferring those powers has commanded, the proper remedy is a common law action in the common law courts." Such an *action*, however, can only be sustained by an individual who has actually sustained damage by the company exceeding their powers. If he has merely reason to apprehend that he will sustain damage by the company exceeding their powers, he may apply to the court for an injunction. But if he has sustained no damage, and there is no reason to apprehend that he will sustain damage, notwithstanding his being nearer to the possible cause of injury than the rest of the public, he has no peculiar position or claim to entitle him to become the redresser of a public grievance, or to complain of the disregard of the provisions of an act of Parliament. Proceedings in such case must be taken on the part of the public by indictment; or in equity by information by the Attorney-General (e).

Act causing injury must be authorized by statute.  
*Caledonian R. Co. v. Coll.*

(a) *Stebbing v. Metropolitan Board of Works*, L. R., 6 Q. B. 37; 40 L. J., Q. B. 1.

(b) *Clarke v. Wandsworth Board*, 7 L. T. 549.

(c) *Croft v. L. and N. W. R. Co.*, 32 L. J., Q. B. 113. It is said by Cockburn, C.J., in that case, at p. 120, that "it makes no difference whether the damage could be foreseen or not," and such would

seem to be the proper construction of the statute. For distinction between future injury and future damage from past injury, see per Fry, L.J., in *Reg. v. Doulton*, L. R. 20 Q. B. 11, at p. 138, and p. 238, post.

(d) *Thomas Chas. v. Prudhoe R. Co.*, L. R., 4 Q. B. 59.

(e) 3 Macq. 838.

(f) *Ware v. Regent's Canal Co.*, 28 L. J., Ch. 153; 23 Beav. 575.

### 3. Review of Cases.

The principles above laid down are always acted upon. In order, therefore, to ascertain whether any particular injury is the subject of compensation or of an action, the first question to be decided is, whether or not the act causing the injury is one which the railway company may *lawfully* do under their acts of Parliament. If it is a lawful act, compensation must be sought under the compensation clauses. If it is not lawful, redress must be sought by an action (*f*).

*Lawrence v. Great Northern R. Co.*  
Injury by flood waters.

In *Lawrence v. Great Northern R. Co.* (*g*), the principle was applied in a case where lands were injured by flood waters penned back by a railway embankment, and in which the company might, by exercising proper caution, have avoided the injury which the plaintiff sustained. It was held that the plaintiff might recover damages for such injury, notwithstanding their purchase of adjoining lands of the plaintiff and payment of compensation for injury to his lands not purchased.

*Broadbent v. Imperial Gas Co.*  
Injunction granted.

Upon similar principles, in *Broadbent v. Imperial Gas Co.* (*h*), in which a gas company made gas so as to cause a nuisance to a market-gardener, although they were authorized by their special act to make gas, yet as the Gas Companies Clauses Act contains a proviso that nothing in the special act shall authorize the company to make gas so as to cause a nuisance; Lord Cranworth, L.C., granted a perpetual injunction to prevent the company working in such a manner as to be injurious to the plaintiff; and his decision was upheld in the House of Lords.

Damage must be actionable but for the statute.

The second rule—that *the damage must be actionable but for the statute*—is best exemplified by the two cases of *Ricket v. Metropolitan R. Co.* (in which the claimant failed) (*i*), and *Metropolitan Board of Works v. McCarthy* (in which the claimant succeeded) (*k*). The rule has been stated in an expanded form as follows:—

“Where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which right gives an additional value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation if by reason of such interference the property, as a property, is lessened in value” (*l*).

(*f*) *Brine v. Great Western R. Co.*, 31 L. J., Q. B. 101; 2 B. & S. 402. See also *Clothier v. Webster*, 31 L. J., C. P. 316; *R. v. Darlington Local Board*, 33 L. J., Q. B. 306; 35 L. J., Q. B. 45; *Cator v. Lewisham Board*, 34 L. J., Q. B. 74; 5 B. & S. 115. In the early case of *Turner v. Shiffeld and Rotherham R. Co.*, 10 M. & W. 425; 8 Railw. Cas. 222, the company was held liable to an action for damage to a house by dust arising from the construction of the works.

(*g*) 16 Q. B. 643; 6 Railw. Cas. 656; 20 L. J., Q. B. 293. An extract from the judgment is given in the 6th edition. See also *Re Ware*, 9 Exch. 395, 402; *Brine v. Great Western R. Co.*, *ubi supra*.  
(*h*) 7 H. L. C. 600; 29 L. J., Ch. 377.  
(*i*) L. R., 2 H. L. 175; 36 L. J., Q. B. 205.

(*k*) L. R., 7 H. L. 243; 43 L. J., C. P. 385; 31 L. T. 182; 28 W. R. 115.

(*l*) Per Thesiger, Q. C., *arguendo*, and adopted by Lord Cairns in *McCarthy*.

In Ricket's case the facts were these:—Ricket occupied the Pickled Egg public-house; the position was such that the passage to it was obstructed by the works of the defendants, constructed under the authority of their special acts, which diminished the number of passengers coming towards the house, and caused the trade of the house to fall off. The obstruction thus caused continued for twenty months only, but the trade did not improve after it had been removed, the traffic of the neighbourhood having been altered by the works. Ricket having sought compensation, the case was heard before the under-sheriff and a jury. The two questions left to the jury were—(1) whether the structure of the house had been injuriously affected, and (2) whether by reason of the obstruction of the carriage-way Ricket had sustained any particular damage. The jury found that there was no damage to the structure of the house, but that the plaintiff had sustained damage in respect of the interruption to his business as a publican (*m*), and assessed such damage at 100*l*. The case was removed into the Queen's Bench by certiorari, and the question for the opinion of that Court was "whether the loss of customers (*m*) by the plaintiff in his trade under the above circumstances was such damage as entitled him to recover." The Queen's Bench was unanimous for Ricket. In the Exchequer Chamber four judges were for reversing, and two for affirming the judgment of the Queen's Bench. In the House of Lords, Lord Westbury had "the strongest opinion" that Ricket was entitled to succeed, but the majority of that House (Lord Chelmsford and Lord Cranworth) pronounced against him.

*Ricket's case.*  
Loss of custom  
by inhibition.

In giving judgment, Lord Chelmsford, after remarking that to reconcile the cases on the subject would be a hopeless task, and affirming the rule that, "unless the particular injury would have been actionable before the company had acquired their statutory powers," no compensation can be claimed, proceeded as follows:—

"In the first place, it is material to inquire whether the plaintiff in error could have maintained an action against the defendants for the alleged consequences of their acts if they had been done without the authority of Parliament. As far as I have been able to examine the cases, in all of them except two, in which an individual has been allowed to maintain an action for damage which he has specially sustained by the obstruction of a highway, the injury complained of has been personal to himself, either immediately or by immediate consequence.

case, L. R., 7 H. L., at p. 253; and by Lord Chelmsford at p. 256, "with this necessary qualification, that where the right which the owner of the house is qualified to exercise is one which he possesses in common with the public, there must be something peculiar to the right in

its connection with the house, to distinguish it from that which is enjoyed by the rest of the world."

(*m*) As to depreciation of selling value of public-house, see *Wardham's case*, L. R., 14 Q. B. D. 747, and p. 222, post.

2. *Review of Cases.*

"The two excepted cases are those of *Baker v. Moore*, (mentioned by Mr. Justice Gould in *Ireson v. Moore* (a), and *Wilkes v. Hungerford Market Company* (o). In the former of these cases the defendant had erected a wall across a public way, in consequence of which several of the plaintiff's tenants left his houses, and he lost the profits of them. In the latter, the plaintiff, a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from the thoroughfare by the defendants continuing an authorized obstruction across it for an unreasonable time. In both these cases it was held that the action was maintainable. The case of *Baker v. Moore* appears to me to be even more doubtful than that of *Wilkes v. Hungerford Market Company*; and, as to this latter case, Chief Justice Erle, in delivering the judgment of the majority of the judges in the present case, observed (p) :—'If the question were raised in an action now, we think it probable that the action would fail both from the effect of the cases which preceded *Wilkes v. The Hungerford Market Company*, and also from the reasoning in the judgment in *Ogilvy v. Caledonian R. Co* (q).' In this observation upon *Wilkes'* case I entirely agree. An endeavour was made by Lord Denman to reconcile that case with the decision which he pronounced in the case of *R. v. London Dock Co.* (r), but in my opinion not very successfully. It is impossible to discover any distinction between the consequential damage which constituted the cause of action respectively in the two cases. Lord Denman said, in '*Wilkes'* case, the act producing the injury was unauthorized by any statute for the period complained of; it was a public nuisance which might have been indicted, and that was the difficulty cast upon the plaintiff. To which a sufficient answer was given by showing that the specific injury of which he complained was one felt by himself alone, and beyond the common and public nuisance.' If, however, the consequential damage is too remote to be the foundation of an action (as it was held to be in the case of *R. v. London Dock Co.*), it is quite immaterial whether no statutory powers have been given, or the given statutory powers have been exceeded. In neither case would an action lie."

The learned judge then remarked that he might be content to rest his judgment against Ricket upon the sole ground that the damage which he had suffered was "too remote to be the subject of an action," but that the diversity of opinion among the judges "rendered it almost imperative upon the House to pronounce an authoritative decision on the whole case." And after reviewing the cases and pronouncing for *R. v. London Dock Co.* (s), in contradistinction to *Senior v. Metropolitan R. Co.* (t) and *Cameron v. Charing Cross R. Co.* (u), and distinguishing and affirming *Chamberlain v. West End of London and Crystal Palace R. Co.* (x), he thus continued :—

"The question entirely depends upon the correct construction of the compensation clauses of the Lands Clauses and Railways Clauses Consolidation Acts. I have already observed that the 6th section of the Railway Clauses Act and the 68th section of the Lands Clauses Act have the same object, and apply to the

(n) 1 I.d. Raym. 486, 491.

(o) 2 Bing., N. C. 281.

(p) 5 B. & S. 161.

(q) 2 Macq. 229.

(r) 5 Ad. & E. 163, 178.

(s) 5 Ad. & E. 163.

(t) 2 H. & C. 258.

(u) 16 C. B., N. S. 430.

(x) 2 B. & S. 605.

permanent works of the companies. The case was argued at your Lordship's bar, both upon the 6th and 16th sections of the Railways Clauses Act, but in my opinion the 6th section is inapplicable. It relates to 'owners and occupiers and all other persons interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof' (not in the course of the construction thereof), and the company is to make 'full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers vested in the company.' This evidently applies to lands immediately affected by the permanent construction of the railway. The 16th section is the one which, if any, must apply to the case of the plaintiff in error. That section empowers the company, for the purpose of constructing the railway, to execute certain specified works, and contains a proviso that in the exercise of the powers granted 'the company shall do as little damage as can be, and make full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers.' That the damage contemplated was not such a consequential damage as that on which the plaintiff's claim is founded is at least probable from the circumstances adverted to by Lord Denman in *R. v. London Dock Co.* (y); that as it was impossible to make the railway without obstructing, at least temporarily, the neighbourhood and stopping up the thoroughfares, that necessary consequence must have been foreseen; and if it had been intended to give any compensation for it, it would have been clearly and distinctly expressed. And a critical examination of the words of the section leads to the conclusion that compensation for remote consequences resulting from a company's works was not intended. The words are 'shall do as little damage as can be,' which, if applying to a consequential injury, would appear to limit the resulting damage to an immediate consequence and not to extend to a remote one."

After distinguishing *Gatlke's case* (z) on the ground that the goods of the plaintiff in that case were damaged, Lord Chelmsford thus concluded:—

"Upon a review of all the authorities and upon a consideration of the sections of the statutes relating to this subject, I have satisfied myself that the temporary obstruction of the highway which prevented the free passage of persons along it, and so incidentally interrupted the resort to the plaintiff's public-house, would not have been the subject of an action at common law as an individual injury sustained by the plaintiff in error, distinguishing his case from that of the rest of the public. That, therefore, he altogether fails to bring himself within the general principle upon which a claim to compensation under the acts in question has been determined to depend; that upon the construction of the clauses on which his claim is rested, the 6th section of the Railways Clauses Act and the 68th section of the Lands Clauses Act are both inapplicable, as his damage arose from the temporary operations of the company, and not from their permanent works. And upon the 16th section of the Railways Clauses Act which does apply to his case his damage was not of such a nature as to entitle him to compensation; the interruption of persons who would have resorted to his house but for the obstruction of the highway being a consequential injury to the plaintiff in error too remote to be within the provisions of that section."

(y) 5 Ad. & E. 163.

(z) 15 Jur. 261; 3 Mac. & G. 155; 3 Railw. Cas. 371.

3. *Review of Cases.*

Lord Cranworth had "considerable doubt," but "eventually arrived at a conclusion," that Ricket's loss of custom was not such as entitled him to compensation. He observed :—

"Both principle and authority seem to me to show that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundation of buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open to claims of so wide and indefinite a character as could not have been in the contemplation of the Legislature.

"The very existence of a railway must cost loss to many persons in its neighbourhood. Every inn or posting-house at which post horses were kept suffered, as is well known, grievous loss by the first establishment of a railroad in its neighbourhood; in fact, the business of such a house was often utterly destroyed. But it was never contended that this was an injury to the house under the 6th section, for which compensation could be demanded. The house sustained no injury, though the profits of the occupier were diminished or destroyed; such a claim, if sustainable, would admit of no limit. The railroad would, it is true, chiefly affect the custom of posting-houses near to it, but it would or might diminish the quantity of posting to an almost indefinite extent, and I can discover no limit to the claims which on the doctrine asserted might be successfully made.

"Precisely the same observation may be made with reference to the present claim. The loss occasioned by the obstruction now under consideration may be greater to the plaintiff than to others, but it affects, more or less, all the neighbourhood. He has no ground of complaint differing, save in degree, from that which might be made by all the inhabitants of houses in the part of the town where the works for forming the railway were carried on."

Damage must be actionable but for the statute.  
*M'Carthy's case.*  
Draw-dock.

In the *Metropolitan Board of Works v. M'Carthy(a)*, the claimant was the occupier of a house in close proximity to a draw-dock which opened into the Thames. He had no right in any way to the use of the dock, except as one of the public; but the dock was quite close to his house, and he made frequent use of it in his business as a contractor for supplying builders with building materials. The dock being destroyed by the Thames Embankment, M'Carthy sought compensation, and the Board having refused, brought this action. A special case stated that M'Carthy's premises "were permanently damaged and diminished in value, either to sell or occupy; and with reference to the uses to which any owner or occupier might put them." The Court of Common Pleas, and afterwards the Exchequer Chamber (diss. Cleasby, B.) gave judgment for M'Carthy, and the House of Lords unanimously affirmed this judgment.

(a) L. R., 7 H. L. 248, distinguishing *Reg. v. Metropolitan Board of Works*, L. R., 4 Q. B. 388, in which the claimant

failed, on the ground that in that case the injury was merely personal.

Accepting the test "whether the act done in carrying out the works is an act which would have given a right of action if the works had not been authorized by Act of Parliament," Lord Cairns, C., observed :—

"Divesting the present case of the more precise description which I have read from the case, it appears to me to amount to this :—The occupier or tenant of a house has got in front of his house two highways, the one highway being a road or a street, and the other, immediately beyond and abutting upon the road or the street, being a highway by water. The highway by water is taken away from him—the highway by land remains. It appears to me that it is impossible to doubt that the destruction of the highway by water, situate as I have described it, is otherwise than a permanent injury to the property in question, by whomsoever or for whatsoever purpose that property may be occupied. The case appears to me to be extremely analogous to *Beckett v. The Midland R. Co. (b)*, in which there was in front of the premises in question in that case one single highway, the farther half, or the farther third portion of which was taken off and blocked up by the execution of the defendant company's works. It was there held that that was an injury which permanently and injuriously affected the premises in question, and it appears to me to be a matter entirely indifferent whether you have one highway, the farther half of which is blocked up and destroyed, or whether you have a double highway, first by land and then by water, and the part of the highway which consists of water is blocked up and destroyed."

*Beckett v. The Midland R. Co.*  
Narrow and public road.

Lord Chelmsford observed :—

"After the many irreconcilable decisions upon the compensation clauses in the Lands Clauses Consolidation Act and the Railways Clauses Consolidation Act, I think we may be said to have arrived at some settled conclusions upon the subject. It may be taken to have been finally decided that in order to found a claim to compensation under the acts, there must be an injury and damage to the house or land itself in which the person claiming compensation has an interest. A mere personal obstruction or inconvenience, or a damage occasioned to a man's trade or the good will of his business, although of such a nature that but for the act of Parliament it might have been the subject of an action for damages, will not entitle the injured party to compensation under it. Some uncertainty still remains as to the particular character of the damage and injury to the house or land itself upon which a claim to compensation may be founded. The learned counsel for the respondent proposed the following rule as a guide to the decision in each case :—'Where, by the construction of works authorized by the Legislature, there is a physical interference with a right, whether public or private, which an owner of a house is entitled by law to make use of, in connection with the house, and which gives it a marketable value apart from any particular use to which the owner may put it, if the house by reason of the works is diminished in value, there arises a claim to compensation.' I think the rule as thus stated may be accepted, with this necessary qualification, that where the right which the owner of the house is entitled to exercise is one which he possesses in common with the public, there must be something peculiar to the right in its connexion with the house to distinguish it from that which is enjoyed by the rest of the world."

Not all that would have been actionable is the subject of compensation.

(b) L. R., 3 Q. P. 82.



3. *Review of Cases.*

Lord Chelmsford proceeded to comment on three of the leading cases as follows :—

*Ogilvy's case.*

“The case of *Caledonian R. Co. v. Ogilvy* (c), furnishes an illustration of the propriety of the qualification of the proposed rule so far as it applies to an interference with a public right. There the claim for compensation was grounded upon the injury done to the appellant's house as a residence, and the deterioration of its value by the railway crossing the approach to the lodge and gate on a level immediately in front of and within a few yards of the gate, whereby the free and open communication with the high road was cut off, and all access prevented, without a constant liability to very great inconvenience, interruption, and delay. This House held that the damage sustained was one which, though it might be greater in degree, was not different in kind from that to which all Her Majesty's subjects were exposed, who were also prevented having free and open communication with the high road, their access to it being in the same manner liable to interruption and delay.

*R. v. Metropolitan Board.*

“This case is clearly distinguishable from that of *Reg. v. The Metropolitan Board of Works* (d), although bearing some resemblance to it. There the occupier of premises near the Thames had been accustomed to exercise a public right of drawing water from the river, and to use a right of way or access to the river for that purpose, and also to resort to and use a public draw dock for loading and unloading barges. In the execution of works authorized by the Thames Embankment Act, the defendants caused an embankment to be erected by which the access to the river was practically cut off, and the access to the dock by barges was attended with difficulty and danger. It was held that the damage complained of was one for which the occupier of the premises was not entitled to compensation; that the injury was of a personal nature, the right interfered with being one which he possessed in common with the public, though, living near, he exercised it more frequently than others. There can be no doubt that that case was properly decided, as there was nothing to show that the rights obstructed were in any peculiar manner connected with the claimant's premises, nor was there any finding that the premises were by the obstruction diminished in value. It is a case precisely similar to that of the *Caledonian R. Co. v. Ogilvy* (c).

*Beckett's case.*

“The present case, as Mr. Justice Willes said, comes within the principle of *Beckett v. The Midland R. Co.* (e). There the plaintiff was possessed of a house fronting on a public highway. The directors of the Midland Railway Company, under the powers conferred upon them by their special act, erected an embankment on a portion of the highway opposite the plaintiff's house, thereby narrowing the road from fifty to thirty-three feet, which occasioned inconvenience by compelling carriages to go some distance beyond his gate before they could turn. It was proved that the house was seriously damaged for occupation purposes and depreciated in value by the embankment and by the narrowing of the road. The part of the road encroached upon was the outer half, the part which was farthest from the plaintiff's premises.

*Metropolitan Board v. McCarthy.*

“At the trial, the jury found that the plaintiff's house was diminished in value by the contracting of the road in front of it. The Court of Common Pleas held that this finding was warranted by the facts of the case. Chief Justice Bovill said (f): ‘If the claimant's right of access from or to the highway was taken

(c) 2 Macq., Sc. App. 229; p. 225, post.  
(d) L. R., 4 Q. B. 858.

(e) L. R., 3 C. P. 82.  
(f) L. R., 3 C. P. 93.

away, nobody would doubt that he was entitled to compensation. If the entire destruction of the claimant's access by raising, or lowering or diverting the road, gives a cause of action or a right to compensation, I am at a loss to understand upon what principle it can be contended that the obstruction of a substantial part of it does not give the same right of action and compensation. In the one case, the premises would be of no value, in the other their value would be substantially diminished.'

"Holding, as I do, *Beckett's case* (g) to have been rightly decided, it appears to me that the present case is scarcely distinguishable from it. As in *Beckett's case*, the respondent's premises abut upon a highway, and his access from his premises to the river Thames, and from the river to his premises, was by means of this highway, which was partly land and partly water. The Board of Works narrowed the highway by destroying that part of it which consisted of the dock, and which was farthest from his premises, and by this narrowing of the highway by the destruction of the dock, the respondent's premises are stated in the special case to have been permanently damaged and diminished in value."

Lord Chelmsford concluded by observing, that the distinction between *M'Carthy's case* and *Ricket's case* was "marked and obvious," inasmuch as in *Ricket's case* there was no finding which related to the premises, but merely of a personal damage; whereas in *M'Carthy's case* the special case expressly stated an injury and damage to the premises.

Lord Penzance, after emphatically affirming the rule, that "whether damage can be recovered under the words 'injuriously affected' depends upon whether it might have been the subject of an action if the works which caused it had been done without the authority of Parliament," proceeded as follows:—

"There are many things which a man may do on his own land with impunity, though they seriously affect the comfort, convenience, and even pecuniary value, which attach to the lands of his neighbour. In the language of the law these things are 'damna absque injuria,' and for them no action lies. Why, then, it may surely be asked, should any of those things become the subject of legal claim and compensation, because, instead of being done, as they lawfully might, by the original owner of the neighbouring land, they are done by third persons who for the public benefit have been compulsorily substituted for the original owners? It may reasonably be inferred that the Legislature, in authorizing the works and thus taking away any rights of action which the owner of land would have had if the works had been constructed by his neighbour, intended to confer on such owner a right to compensation co-extensive with the rights of action of which the statute had deprived him. But on no reasonable ground, as it seems to me, can it be inferred that the Legislature intended to do more, and actually improve the position of the person injured by the passing of the act. There is another rule which is, I conceive, well settled in these cases, namely, that the damage or injury which is to be the subject of compensation must not be of a personal character, but must be a damage or injury to the 'land' of the claimant, considered independently of any particular trade that the claimant may have carried on upon it. This was decided in *Reg. v. Metropolitan Board of Works* (h).

Right to compensation co-extensive with barred right of action.

(g) L. R., 8 C. P. 82.

(h) L. R., 4 Q. B. 358.

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"I proceed to apply these rules to the present case. It is admitted that the jurors have found that the respondent's premises are permanently depreciated in value (independently of any special consideration relating to the trade there carried on) to the extent of 1,000*l*. And this depreciation has been caused by the stopping up and wholly obliterating, as a highway, of a portion of an approach to the river Thames, which, before the works of the appellants were made, flowed within a short distance of the respondent's premises, and constituted a ready access by water between his premises and the great water highway of that river. If the respondent's right as owner of the land to have access to that highway had been a private right of way, no doubt an action would lie for its disturbance and obstruction. But, being a public right, it is said that the only remedy at law is by indictment. This is a well-known rule, but governed and limited by an equally well-known exception. It is upon the true meaning of this exception that the present case, in my opinion, wholly depends. It is well, therefore, to look back to the older cases, in which this exception was first established, to ascertain the exact terms in which it is expressed.

"In *Tyson v. Moore* (i), the language of the judges in the Exchequer Chamber, affirming the exception and establishing the right of action, was, that 'the plaintiff did necessarily suffer an especial damage more than the rest of the king's subjects.' In *Ashby v. White* (k), the language was, 'still if any person have sustained a particular damage beyond that of his fellow citizens,' &c. The judges do not say a damage of a different kind or description from that suffered by other subjects, but 'more than' and 'beyond' their fellow citizens. The question then is, whether, when a highway is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed, suffer especial damage 'more than' and 'beyond' the rest of the public. It surely cannot be doubted but that they do. The immediate contiguity to a highway, commonly called frontage, is a well-known and powerful element in the value of all lands in populous districts. Where frontage to a high road does not exist, propinquity and easy access to a high road are equally undoubted elements of value in such districts, distinguishing lands which have them from those which have them not. If, then, the lands of any owner have a special value by reason of their proximity to any particular highway, surely that owner will suffer special damage in respect of those lands beyond that suffered by the general public, if the benefits of that proximity are withdrawn by the highway being obstructed. And if so, the owner of such lands appears to me to fall within the rule under which an action is maintainable, though the right interfered with is a public one.

"It was asked in argument where are the claims to compensation to stop if the rule be so applied. The answer, I think, is, that in each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attached to the premises in question by reason of their proximity to or relative position with the highways obstructed, and that this special value has been permanently destroyed or abridged by the obstruction.

"If this limit be thought a wide one, and the number of claimants under it likely to be numerous, that is only the misfortune of the undertaking, for the limit does not exceed the range of injury. On the other hand, all claim for compensation will vanish, as receding from the highway the case comes into question

(i) 1 *Ld. Raym.* 486; *S. C.*, 1 *Salk.* 15.

(k) *Sm. L. C.*, 7th ed., vol. 1, p. 251.

of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicated and proved that the value of the lands depends on the position relatively to the highway which they occupy."

It will have been seen that the rule of *Ricket's case*—that no compensation can be given except in respect of actionable damage—was affirmed in *McCarthy's case*. The rule, however, had been emphatically dissented from by Lord Westbury, and its effect was avoided by sect. 40 of the Metropolitan Inner Circle Completion Act, 1874, 37 & 38 Vict. c. cxcix. in the following terms:—

Special enactment to meet the rule of *Ricket's* and *McCarthy's* cases.

"The company shall make proper compensation to the owners, lessees, and occupiers of any premises situate within the said parishes of Saint Clement near Eastcheap, Saint Martin Ongar, Saint Mary Abchurch, and Saint Lawrence Pountney, and possessing frontages to the said line of railway No. 1 [see s. 6], and to the several scheduled parties in respect to their respective premises aforesaid, for any loss, injury, or damage which they may respectively sustain or incur in their respective trades, businesses, or professions by reason of the execution of the works of or in connexion with the said railway, either by the access to their respective places of trade or business being either temporarily or permanently obstructed or rendered less easy of access and convenient than at present, or by the temporary or permanent obstruction, diversion, or decrease of traffic along Cannon Street, King William Street, and Gracechurch Street, or any of them, or by rendering necessary the removal of stock or the incurring of additional costs and expenses in carrying on business or otherwise, such compensation, in case of difference to be ascertained according to the provisions contained in the Lands Clauses Consolidation Act, 1845."

We will now pass to such of the decisions on the subject-matter of the rule of *Ricket's case*, as have not been fully commented on in the judgments above, or are of sufficient importance to call for special notice.

In *R. v. Eastern Counties R. Co. (l)*, which was argued upon a return to a mandamus, requiring the defendants to assess compensation to a landowner, where a public road adjoining the land of the applicant was lowered by the defendants under the powers of their special act, whereby access to the land was impeded, and additional fences rendered necessary; it was held that the landowner was entitled to compensation, although none of his land had been taken for the purposes of the act; and on a similar principle compensation has been held recoverable where levels of a street adjoining the claimant's land were altered (*m*).

*R. v. Eastern Counties R. Co.*  
Lowering public road.

Upon similar principles (*n*), in a case in which the plaintiff occupied a cottage and a small piece of land on a level with and abutting on a

*Moore v. Great Southern and Western R. Co.*

(l) 2 Q. B. 847; 2 Railw. Cas. 730. See also *Digg v. Corporation of London*, L. R., 15 Eq. 376, in which case the roadway of a public street was lowered, but the claimant was held entitled to recover for direct structural injury occasioned by an unauthorized interference with his cellar, but not for indirect injury to his trade, resulting from diversion of traffic.

As to compensation under a special act for deterioration of houses in value by the lowering of a street, see Metropolitan District Railway Act, 1875, 38 & 39 Vict. c. cxcviii., s. 11.

(m) *Furness R. Co. v. Cumberland Building Society*, 52 L. T. 144.

(n) *Moore v. Great Southern and Western R. Co.*, 10 Ir. C. L. R. 46 (1859);

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public high road, from which a short way or passage over the plaintiff's land afforded access to his cottage, and a railway company, in the execution of the works of their railway, lowered the public high road seven feet, leaving the plaintiff's land and cottage on the edge of a precipice of that height, and thereby obliging the plaintiff to make use of a step-ladder in order to obtain access from the public high road to the way or passage leading over his land to his cottage; it was held by the Court of Exchequer Chamber in Ireland, that the injury complained of by the plaintiff, being an injury of a permanent nature to his land, was the subject of compensation under the Railways Clauses Consolidation Act, 1845, s. 6, and 14 & 15 Vict. c. 70.

*Chamberlain's*  
*case.*

Depreciation of  
selling value by  
obstruction of  
road.

In *Chamberlain's case* the plaintiff was lessee of some houses situate on a high road, and the defendants, being authorized by their act to do so, made an obstruction and deviation of the road by which that part of it running by the plaintiff's houses was no longer used as a high road, and the number of persons passing by the houses was greatly reduced, so that *the houses* were rendered *less valuable* as shops; it was held, that the plaintiff's property was injuriously affected, and he was entitled to compensation (o); and a similar decision was arrived at in a case where the value of an hotel for using, selling or letting as an hotel and public-house had been diminished by the stopping up of a street (p).

*Glover v. North*  
*Staffordshire*  
*R. Co.*

Crossing private  
roads.

In *Glover's case* (q) the plaintiff was the owner and occupier of a house and lands approached by two private roads, over which the plaintiff had a right of way as appurtenant to his farm for passing on foot and with carriages, and which formed the only access to his premises. The defendants carried their railway across these roads on the level, in a direction nearly north and south, and so that a person standing on the roads where they were intersected by the railway could not see a train approaching, until within a few seconds of its arrival at these points. There were gates on each side of the railway across each of the roads, of which gates the plaintiff had a key. Lord Campbell, C.J., said:—

“It is clear that the plaintiff is entitled to judgment. The property is depreciated in value by the company doing that which would be actionable, unless they were protected by the powers of their act. I agree that this affords a very fair

followed in the same year in *Tucker v. Great Southern and Western R. Co.*, 10 Ll. C. L. R. 98, where the public road was raised.

(o) *Chamberlain v. West End of London and Crystal Palace R. Co.*, 31 L. J., Q. B. 201; aff. in Exch. Ch., 32 L. J., Q. B. 173; 2 Best & S. 605; affirmed and distinguished in *Ricket's case*, p. 212, ante.

(p) *Wadham v. North Eastern R. Co.*, L. R., 14 Q. B. D. 747; 54 L. J., Q. B. 843; 52 L. T. 894; 33 W. R. 215; aff. in C. A., L. R., 16 Q. B. D. 226; 55 L. J., Q. B. 272; 34 W. R. 312.

(q) *Glover v. North Staffordshire R. Co.*, 16 Q. B. 212; 20 L. J., Q. B. 376; 13 Jur. 673; affirmed and distinguished in *Ricket's case*, p. 212, ante.

criterion of the right to receive compensation. No doubt there may be a loss arising from the making of a railway, which would not support a claim of compensation, because the act might be one which would be legal without the powers conferred by the act. But this is not such a case. This interference would have given a cause of action against a private person, and it has depreciated the plaintiff's property, which is therefore injuriously affected by it. The erection of the gates and the passage of the trains are both acts done to the prejudice of the plaintiff, and to the diminution of his right."

In *Guttker's case* (r) the claimant was a draper and furrier, and the question in the suit arose out of his claim for compensation, as being injuriously affected by the execution of the works of the railway company. The damage alleged to have been sustained by the claimant was in consequence of the dust and dirt occasioned by the company having damaged his goods, and by reason of his customers having been compelled by the obstruction occasioned by the plaintiff's works to quit the side of the road upon which the claimant's shop was situated, before they arrived at his shop, and to cross to the opposite side of the road in order to pass along; by reason whereof, during several weeks, he had sustained a great loss in his trade. The claimant also alleged that he had been injuriously affected and injured by the company having stopped up a passage, along which he was entitled to a right of way to the entrance at the back of his premises. No part of the claimant's premises were inserted in the schedule to the company's special act, and no part of them had been taken, used or at all interfered with by the works of the company, except as aforesaid. The claimant commenced an action against the company to recover 400*l.*, under sect. 68 of the Lands Clauses Act; and Lord Truro, C., dissolved an injunction which the company had obtained to restrain this proceeding.

*Guttker's case.*  
Draper's goods  
damaged by dirt  
and dust, &c.

In *Cooling's case* the access to an ancient ferry was obstructed by a railway company, and the owner was held entitled to compensation (s). The facts were that the Great Northern Railway Company, in 1848, made and constructed a portion of their line of railway along the west bank of a cut or river called the Fosdyke, in Lincolnshire. The owner of certain lands gave the company notice that he required compensation in respect of his interest in the lands, as owner in fee-

*Re Cooling.*  
Access to ferry  
impeded.

(r) *East and West India Docks R. Co. v. Guttker*, 3 Macn. & Gord. 155; affirmed and distinguished in *Kicket's case*, p. 212, ante. See also *Knoek v. Metropolitan R. Co.*, L. R., 4 C. P. 131; 38 L. J., C. P. 78. In *L. and N. W. R. Co. v. Bradley*, 6 Railw. Cas. 551, the claimant was allowed to proceed for compensation for damage to the beer in his cellar, which the vibration of trains, used in working the railway, had caused to turn sour. But this decision is impliedly overruled by *Brand's case*, L. R.,

4 H. L. 171, p. 231, post.

(s) *Re Cooling*, 19 L. J., Q. B. 25; S. C., nom. *R. v. Great Northern R. Co.*, 14 Q. B. 25; and see *Sutton Harbour Commissioners v. Hitchen*, 21 L. J., Ch. 73; *Marey v. Metropolitan Board of Works*, 33 L. J., Ch. 377, where the plaintiff's right of access to the River Thames, and of loading, &c. barges, was blocked up, and Wood, V.-C., said it was a case for compensation, not purchase, under the Lands Clauses Act.

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simple, and that the manner in which such lands had been injuriously affected was by the disturbance of and cutting off the communication with the ancient ferry attached and belonging to and held with the lands in question, and by erecting another ferry near to such ancient ferry belonging to him; by all which said acts they had considerably reduced the profits of his said ancient ferry. The company having issued their warrant, the claimant contended before the jury that he was entitled to compensation in respect of the obstruction of the ferry; and he proved that he had sustained damage in respect of the same; and the jury awarded 380*l.* as compensation.

In discharging a rule for a certiorari to remove the inquisition, Patteson, J., said :—

“Cooling claims compensation from the Great Northern Company in respect of an injury to land held by him in fee, in the city of Lincoln. The injury, if any, is occasioned by the works of the company, in the county of Lincoln, on the other side of the Fossdyke, by cutting off the communication on the Lincolnshire side with a ferry, said to belong or be appurtenant to the land of Cooling. Objection is made that this case is within the principle of *R. v. London Dock Co.* (t), where it was held that the destruction of houses and public roads in the neighbourhood of a public-house, by which the custom of the house was diminished, was not the subject of compensation. But the present case is quite distinguishable. Here the ferry is a private right, and if it be attached to the land of Cooling, the value of that land is seriously affected. The question is whether it be so attached. Cooling is not the owner of the water nor of the landing-places, as it should seem, on either side, certainly not on the Lincolnshire side. But it is not essential to a ferry, that the owner of it should have the land on either side, if he has the right of using that land for the purpose of the ferry (u). And the evidence of user here for many years is abundant to show such right. Under all the circumstances we think the jury were justified in coming to the verdict that it did.”

Diversion of traffic from ferry.

*Hopkins v. G. N. R. Co.*

It was held in *Reg. v. Cambrian R. Co.* (x), that the owner of an “exclusive” ferry, which crossed a river some 300 yards below the point where the railway crossed it by a bridge, was entitled to compensation for loss of traffic diverted by the railway, on the ground that the ferry was a franchise and a hereditament. But this case was overruled by the Court of Appeal in *Hopkins v. G. N. R. Co.* (y), where it was held that the owners of a ferry, the traffic across which had been ruined by the construction, about half a mile off, of a railway bridge and footway attached thereto, which footway was used as a passage to the railway station and also to other places, were not entitled to compensation; and it was pointed out that the “exclu-

(t) 5 A. & E. 163; affirmed in *Duckett's case*, L. R., 2 H. L. 175.

(u) *Pier v. Kendal*, 6 B. & C. 703.

(v) L. R., 6 Q. B. 423; 40 L. J., Q. B. 169, per Cockburn, C. J., and Blackburn,

J., distinguishing both *Emmell's case*, L. R., 2 H. L. 175; and *Brant's case*, L. R., 4 H. L. 171.

(y) L. R., 2 Q. B. D. 224; 46 L. J. Q. B. 265; 36 L. T. 898, C. A.

sive " rights of the owners of a ferry exclude only passage by boats and not passage in any other manner.

Inasmuch as no claim to compensation can be sustained, unless the claimant has sustained damage which would be actionable but for the statute, it is material to ascertain what is actionable damage, and what is not. Where the injury is common to all the Queen's subjects, no compensation can be recovered unless the injury to the claimant be of a special character. Thus, in the case of *The Caledonian R. Co. v. Ogilvy*, in the House of Lords (c), where a railway passed within a few yards of a gentleman's lodge, across a public road, forming the chief access to his residence, although he was liable to constant stoppages by the closing of the gates on the level crossing, and the passing of trains frightened his horses, and terrified his visitors, particularly ladies; it was held, that these annoyances did not ground a claim of damages against the railway company, the inconvenience felt in such a case being one to which all the Queen's subjects are exposed, and for which no particular or individual remedy exists. It was also held, that it is a mistake to regard the proximity of a level crossing as injurious to an estate or residence within the meaning of railway legislation. In giving judgment, Lord Cranworth, L. C., said :—

(c) *Caledonian R. Co. v. Ogilvy*,  
Crossing public  
road on a level

"The merits of this case involve a question of considerable importance, namely, whether a proprietor, who holds lands adjoining a newly-constructed railway, can, under the clauses of the general act and the special acts which give him a right of compensation in respect of any injurious effect upon his lands, claim from the company compensation, because at a short distance from the entrance to his grounds the railway traverses an important public road upon a level.

"The map which both parties here have referred to, and which we may take therefore, as accurately representing the state of the ground, shows that at a short distance (whether of forty-nine yards or fifty-nine yards is immaterial) from his gate, the railway does traverse upon a level a public road, which, though not the only approach, is yet the most common and the best approach to his house. He claimed compensation, and the sheriff's jury returned a verdict for 300*l.* in respect of land and freestone, and for 560*l.* in respect of severance and level crossing, but without distinguishing how much had been assessed for the severance and how much for the level crossing. The question is, whether it was competent to the sheriff to give any redress in respect of this level crossing. And, my Lords, I am of opinion, that no compensation can be claimed or legitimately given on this head of complaint.

"These acts of Parliament are, as is unfortunately too often the case, loosely worded; but the construction that is put upon this expression 'injuri-ously affected,' in the clauses in the act of Parliament which gives compensation for injuri-ously affecting land, certainly does not entitle the owner of lands, which

(a) 2 Macq. 229. See also *Wood v. Metropolitan R. Co.*, 37 L. J., C. P. 281; 16 *Stourbridge R. Co.*, 16 C. B., N. S. 222; *W. R.* 1117.  
*Metropolitan Board of Works v. Metro-*



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he alleges to be injuriously affected, to any compensation in respect of any act which, if done by the railway company without the authority of Parliament, would not have entitled him to bring an action against them. I purposely guard myself by putting it in that way, because I am far from admitting that he would have a right of compensation in some cases in which, if the act of Parliament had not passed, there might have been not only an indictment, but a right of action. And the necessity of so guarding myself is made apparent by the case of *Greenly v. Culling* (a), which, if the law be applicable to a railway, would certainly entitle everybody, who is stopped for the minute whilst the gates are shut, to an action for damages, because it would be said, under the authority of that case, which I think is a very correct decision, that where an act is done, such as shutting gates across a public road without the authority of Parliament, that gives the parties a right of action. If, therefore, the act of Parliament did not mean to exclude the right of compensation in some cases in which, if the act had not passed, there would have been redress, every person who is stopped for a moment, while the gates of a railway are shut at a level crossing, would be entitled to an action."

After pointing out that it was clear that Parliament intended to authorize acts with regard to which they were to be freed either from indictment or action, Lord Cranworth proceeded :—

"Now, my Lords, that being the case, suppose that, without any act of Parliament having been passed for making this railway, certain speculators had taken upon themselves to make a railway across a public road, and had erected gates, certainly the owner of the estate might, with respect to any detention occasioned to him by the closing of those gates, bring an action against the makers of the railway; and as he might do this *toties quoties*, he would probably have more frequent rights of action than other subjects of her Majesty. But it would only be a more frequent repetition of the same damage; it would not be any damage different from that which might be sustained by any other subjects of her Majesty; for all attempts at arguing that this is a damage to the estate is a mere play upon words. It is no damage at all to the estate, except that the owner of that estate would oftener have a right of action from time to time than any other person, inasmuch as he would traverse the spot oftener than other people would traverse it.

"It appears to me, therefore, clear by the acts of Parliament and by the intention of the Legislature, that there is no right of compensation whatever, for, except for any actual detention, no right of action would have existed, if the making of the railway had not been authorized by Parliament, and the detention caused by the necessary closing of the gates is certainly made lawful by the act."

Exception to  
rule where land  
taken.

*Re Stockport,  
Timperley and  
Altringham R.  
Co.*

The rule, that compensation cannot be claimed unless the damage result from an act done under the act of Parliament, and an action at law would have lain but for the act, was said in *Re Stockport, Timperley and Altringham R. Co.* (b), not to apply where compensation is sought for an injury to one portion of the claimant's lands arising from acts done by the company on another portion of the claimant's lands which has been taken by the company. Where, therefore, a

(a) 2 Bing. 268.

(b) 38 L. J., Q. B. 251.

cotton mill belonging to the claimant, situate on land adjoining that taken from him by the company, became exposed to fire from engines passing along the railway on the land so taken, and could only be insured at an increased rate; it was held by Crompton, J., sitting alone in the Bail Court, that the claimant was entitled to compensation in respect of the liability to pay such increased rate of insurance. In a considered judgment, after stating the rule with approval, Crompton, J., observed:—

“The question here is whether such rule is at all applicable to cases where part of the land is taken and compensation is given not only for the value of the part taken but for the rest of the land being injuriously affected either by severance or otherwise, and I am of opinion that the distinction pointed out by Mr. Manisty is correct, and that the rule in question does not apply to such cases. Where the damage is occasioned by what is done upon other land which the company have purchased, and such damage would not have been actionable as against the original proprietor, as in the case of the sinking of a well, and causing the abstraction of water by percolation, the company have a right to say, We have done what we had a right to do as proprietors, and do not require the protection of any act of Parliament; we, therefore, have not injured you by virtue of the provisions of the act; no cause of action has been taken away from you by the act. Where, however, the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say it is by the act of Parliament and the act of Parliament only that you have done the acts which have caused the damage; without the act of Parliament everything you have done and are about to do in the making and using the railway would have been illegal and actionable,—and is therefore matter for compensation according to the rule in question.”

This important judgment, after having been much criticized for many years, though never overruled, was expressly followed and emphatically approved by Mathew and Day, JJ., in *Reg. v. Essex* (c), but dissented from by two members of the Court of Appeal in their reversal of that case, which, however, as the Court pointed out, is clearly distinguishable from the *Stockport case*. In *Reg. v. Essex* part of land laid out as a building estate was taken by a local board for a sewage farm, whereby the value of other parts situated near to, but separated from, the part taken, was much depreciated, whereas in the *Stockport case* there was no intervening land between the part taken and the part damaged but not taken. The Court of Appeal held that no compensation was recoverable for injuriously affecting the parts of the land other than those taken in the exercise of the statutory powers, Lord Esher, M. R., observing, that if he were part of a tribunal which could overrule the *Stockport case*, he should be

Statute of the  
Stockport case.

(c) L. R., 14 Q. B. D. 753; 54 L. J., Q. B. 549; 52 L. T. 926; 33 W. R. 214, reversed by C. A., L. R. 17 Q. B. D. 447;

55 L. J., Q. B. 313; 54 L. T. 779; 34 W. R. 587.

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prepared to overrule it, and Lindley, L. J., considering it "very doubtful." The preponderance of authority is against the judgment (*d*), and it is submitted that it is wrong, and has been sufficiently doubted since it was first pronounced to be overruled by the House of Lords, if a majority of that House should think fit to overrule it. Meanwhile, though the principle of the judgment will not be extended, it seems to be binding on a Divisional Court, and even on a Court of Appeal.

*Penny v. South  
Eastern R. Co.*  
Injury to ameni-  
ties.

A landowner is not entitled to compensation for every kind of disturbance or inconvenience caused by the construction of a railway, though the value of his habitation be deteriorated, the comfort diminished, and the amenity destroyed. In a case (*e*), therefore, in which a sheriff's jury had granted, in one lump sum, compensation to the owner of a house, upon a claim in respect of the constant noise and shaking, and annoyance by day and night, caused by the passage of trains, and from the circumstance of the back windows and garden being overlooked by persons on the railway platform, and the privacy thereby invaded, the Court of Queen's Bench granted a certiorari to remove, for the purpose of quashing, the inquisition; Lord Campbell saying,—

"The test is, whether, before the railway act passed, authorizing the company to do what had been done here, an action would have lain at common law for what had been done and for which compensation had been claimed. If it would, and that act is authorized by the railway act, compensation may be claimed in respect of it: if the land is not taken and nothing is done which would have afforded a cause of action before the act passed, then, although it may produce a deterioration of the property, it does not injuriously affect the land and constitute a ground for compensation. The under-sheriff told the jury that they ought to give compensation for the claimant's ground being overlooked and his privacy being disturbed: for that an action would not have lain. Compensation might just as well be claimed if a mound had been constructed half a mile off, and it cut off the view of a fine wood or a church."

Deprivation of  
access to river  
and landing-  
place.

It was, however, held by the House of Lords, in *The Duke of Buccleuch v. Metropolitan Board of Works* (*f*), that where the Thames Embankment was constructed in front of the claimant's house, so as to deprive him of access to the river and to a landing place, he was entitled to compensation for the depreciation in value of his house as a residence.

(*d*) Against it are Blackburn, Lush, and Keating, JJ., in the *Duke of Buccleuch's case*, L. R., 5 Ex. 255; Bramwell, B., in the same case, L. R., 8 Ex., at p. 328; Lords Chelmsford and Hatherley in the *Glasgow case*, L. R., 2 Sc. App., at p. 81; and Lord Esher, M. R., in *Reg. v. Essex*, L. R., 17 Q. B., at p. 452. For it are Montague Smith, Willes, and Brett, JJ.,

in the *Duke of Buccleuch's case*, L. R., 5 Ex. 255, and Mathew and Day, JJ., in *Reg. v. Essex*, L. R., 14 Q. B. 753.

(*e*) *Penny v. South Eastern R. Co.*, 28 L. J., Q. B. 225; 7 E. & B. 660; indirectly affirmed in *Brand's case*, L. R., 4 H. L. 171.

(*f*) L. R., 5 H. L. 418; 41 L. J., Ex. 137; 27 L. T. 1.

Where an umpire awarded that the execution of certain railway works had occasioned a diminution of light to the plaintiff's house, whereby it was rendered less convenient and suitable for his trade, but the saleable value of his interest in the house was not diminished; it was held, that he was entitled to recover the amount awarded as compensation (*g*).

*Eagle v. Charing Cross R. Co.*  
Injury to Light.

And if a landowner has not actually sustained damage, and there is no reason to apprehend that he will sustain damage, notwithstanding his being nearer to the possible cause of injury than the rest of the public, he has no peculiar position or claim to entitle him to become the redresser of a public grievance, or to complain of the disregard of the provisions of an act of Parliament. Proceedings in such a case must be taken on the part of the public by indictment, or in equity by information by the Attorney-General. In a case (*h*), therefore, which has already been referred to, in which a canal company having power by act of Parliament to raise an embankment to a certain height, exceeded that height, and the plaintiff, fearing that his lands might thereby be flooded, filed a bill for an injunction, his bill was dismissed; the Lord Chancellor saying,—

Possibility of damage not sufficient.

*Worce v. Regent Canal Co.*

“The language of Lord Eldon in *Blakemore v. Glamorganshire Canal Co.* (*i*) certainly appears to sustain the proposition of the plaintiff to its fullest extent, but I adopt the interpretation of that language by Baron Alderson, in *Lee v. Milner* (*k*), and with him I say these acts ‘ought to be treated as conditional powers given by Parliament, to take the lands of the different proprietors, through whose estates the works are to proceed. Each landowner, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and also to require that no variation shall be made to his prejudice, in the carrying into effect the bargain between the undertakers and any one else.’ The words ‘to his prejudice’ may mean not only to his possible but actual prejudice, and Lord Eldon himself seems to have qualified and explained the generality of his own language, by one of the issues in *Blakemore v. Glamorganshire Canal Co.*”

Where there is an original equity affecting the claim to compensation, as where the landowner has entered into an agreement as to the compensation he is entitled to, a Court of Equity would interfere to stay by injunction proceedings to obtain compensation under the Lands Clauses Act. This appears from the following case (*l*):—Damages were claimed for injuries done to a brewery, by the erection

Proceedings to obtain compensation stayed by injunction where claim affected by an original equity  
*Duke of Norfolk v. Tennant*.

(*g*) *Eagle v. Charing Cross R. Co.*, 38 L. J., C. P. 297; L. R., 2 C. P. 688; 18 L. T. 593; see also *Clark v. London School Board*, L. R., 9 Ch. 120; *Bodford (Duke of) v. Dawson*, L. R., 20 Eq. 353; 44 L. J., Ch. 649; *Reg. v. Poulter*, 57 L. T. 488, in which printers and coloured paper merchants recovered compensation for damage caused and to be caused by their

removal to new premises.

(*h*) *Warr v. Regent's Canal Co.*, 28 L. J., Ch. 163; 3 De G. & J. 212; 23 Beav. 575.

(*i*) 1 Myl. & K. 151.

(*k*) 2 M. & W. 824.

(*l*) *Duke of Norfolk v. Tennant*, 16 Jur. 398; 9 Harv. 745.

8. *Review of Cases.*

of a new market, under an act of Parliament which incorporated the Lands Clauses Act. The damages claimed were—first, for narrowing a street bounding the brewery; secondly, for temporary obstruction of the thoroughfare; and thirdly, for obstruction of the access of light and air, and contracted ventilation. This last damage did not appear to have been complained of or discovered until the new market buildings had arisen to a considerable height. The defendant, the owner of the brewery, gave one notice, embracing all the three heads of complaint, to proceed by arbitration, according to sects. 25 and 68 of the Lands Clauses Act. There had been a treaty for compensation for the two former heads of damage, but it did not appear to have been completed and carried into effect. There had been no treaty for compensation as to the third ground of complaint. Under these circumstances, Sir G. Turner, V.-C., granted an injunction to prevent the defendant from proceeding under the notice he had given.

*R. v. Hungerford Market Co.*

No compensation for works not within act of Parliament.

And where acts done by the company are not necessary for the construction of their works, it seems that persons damaged thereby are not entitled to compensation. Where, therefore, the Hungerford Market Company pulled down a house which they purchased; and, in doing so, ascertained that the party-wall of the adjoining house was of an insufficient thickness, whereupon the company took proceedings under the Metropolitan Building Act, and the wall was rebuilt; it was held, that the occupier of the adjoining house was not entitled to receive compensation for damages sustained by loss of trade, &c., whilst the wall was rebuilding (*m*), Lord Denman, C. J., saying,—

“The company have only exercised an ordinary right: finding that a house, adjoining one which they had purchased, had an insufficient party-wall, they, as any purchaser might have done, enforced the provisions of the Building Act. It is true that the pulling down of the house was an act done in pursuance of the statute; so was every act, even to the minutest, done by the company in the course of these works; but it would be going very far to say that on that account the 68th section [the compensation clause] applied to everything that was so done. The only question here is, whether the particular act from which the damage immediately proceeded was in pursuance of the statute. I think it was not, but that the company merely exercised the right which belonged to any purchaser.”

So where the same company purchased a house, No. 11, and pulled it down, and thereby caused damage to the occupier of No. 12, it was held, that the occupier of No. 12 was not entitled to receive compensation, it appearing that No. 11 was purchased by the company under an agreement with the owner; and neither No. 11 nor No. 12 being mentioned in the schedule to the company's act (*n*).

(*m*) *R. v. Hungerford Market Co.*, 1 A. & E. 668.

(*n*) *R. v. Hungerford Market Co.*, 1 A. & E. 676.

It is hoped that the rule of *Ricket's case*, that compensation is given for actionable damage only, has now been sufficiently illustrated. It may be added, shortly, that compensation has been held to be recoverable for damage sustained by removing a weir (*o*); by cutting off a stream (*p*); by cutting off access to the sea (*pp*); by obstruction of direct and easy access to a street (*ppp*); by cutting off access through a hall to rooms on a first floor (*q*); by diminishing a flow of water (*r*); by vibration of trains during construction of line (*s*); and generally by any injury during construction (*t*); by occasional flooding of land (*u*); and by loss of goodwill of business (*x*); but not by obstruction to the claimant's house by a hoarding (*y*); nor by tunnelling under a public street, of which the claimant was a frontager (*z*); nor by an interference with a right of shooting (*u*); nor (in a case which turned chiefly on the construction of a special act) for damage sustained by obstructing the right of access to a sewer for the purpose of repairing it in conformity with an obligation under the special act (*b*); nor by taking up the disused pipes of a water company (*bb*).

Short statement of other cases as to compensation.

The third rule, that *the damage must arise by reason of the construction, and not of the working of the railway*, was authoritatively settled by the House of Lords in *Hammersmith R. Co. v. Brand* (*n*). The facts were these: Mrs. Brand occupied a private house near the railway. Neither the house nor any land of Mrs. Brand was taken for the purpose of the railway, which was opened for public traffic in June, 1864. In the following July Mrs. Brand claimed compensation for damage caused by (*inter alia*) "the working of the railway and the running of trains over it after it had been opened, and by the vibration, noise and smoke which had been and always would be occasioned thereby, and the consequent depreciation in value of the premises." The railway company having formally objected that no

Damage must arise by construction, not working of railway.

*Hammersmith R. Co. v. Brand.*

(*o*) *R. v. Nottingham Old Waterworks*, 6 A. & E. 355.

(*p*) *Little v. Drogheda R. Co.*, 7 Ir. C. L. 32; *Mortimore v. South Wales R. Co.*, 29 L. J., Q. B. 129; 1 E. & E. 875.

(*pp*) *R. v. Rynd*, 16 Ir. C. L. 29.

(*ppp*) *Caledonian R. Co. v. Walker's Trustees*, L. R. 7 App. Cas. 259, where see the cases reviewed. *Fleming v. Newport R. Co.*, L. R. 8 App. Cas. 265, turned upon the construction of a "fen contract."

(*q*) *Ford v. Metropolitan and Metropolitan District Railway Companies*, L. R., 17 Q. B. D. 12; 55 L. J., Q. B. 296; 54 L. T. 718; 34 W. R. 426—C. A.

(*r*) *Bush v. Trowbridge Waterworks*, L. R., 19 Eq. 291; 44 L. J., Ch. 285; L. R., 10 Ch. 459; *Stons v. Mayor of Fecvil*, L. R., 2 Q. P. D. 99; 46 L. J., C. P. 187; affirming judgment below, L. R., 1 C. P. D. 691.

(*s*) *Croft v. L. and N. W. R. Co.*, 32 L. J., Q. B. 113.

(*t*) *Ford's case*, note (*q*), supra.

(*u*) *Ware v. Regent's Canal Co.*, 23 L. J., Ch. 156; 3 De G. & J. 212; 23 Beav. 575.

(*v*) *White v. Commissioners of Works*, 22 L. T. 591.

(*y*) *Herring v. Metropolitan Board*, 31 L. J., M. C. 224.

(*z*) *Souch v. East London R. Co.*, L. R., 16 Eq. 108; 42 L. J., Ch. 477.

(*a*) *Dird v. Great Eastern R. Co.*, 31 L. J., C. P. 366; 19 C. B., N. S. 268.

(*b*) *Birkhead (Mayor) v. London and North Western R. Co.*, L. R., 15 Q. B. D. 572; 55 L. J., Q. B. 48—C. A.

(*bb*) *New River Co. v. Midland R. Co.*, 36 L. T. 539.

(*c*) L. R., 4 H. L. 171; 38 L. J., Q. B. 284.

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*Cases.**Hampden & Smith*  
*It Co. v. Boyd.*

compensation could be claimed under this head, the damage was assessed separately, and the question for the Court was whether the claimant was entitled to have compensation made to her under such head.

The Court of Queen's Bench, Mellor and Lush, JJ., pronounced for the company, the Exchequer Chamber (diss. Channell, B.) for the claimant. The majority of the House of Lords (*1*), Lord Chelmsford and Lord Colonsay (diss. Lord Cairns) gave judgment for the company.

Lord Chelmsford, after pointing out that the question in the case was confined to the injury from "vibration from the use of the railway after construction," and remarking that the question was governed by *Vaughan v. Taff Vale R. Co.* (*c*), and that that case was rightly decided, proceeded as follows:—

"The sections of the Railway Clauses Act which appear to be alone necessary to be considered are the 6th and 16th sections. I do not think that the sections of the Lands Clauses Act which were referred to in the argument are applicable.

"The sections of the Railways Clauses Act are, as your Lordships know, arranged in order under different heads, which indicate the general object of the provisions immediately following; and these may be usefully referred to to determine the sense of any doubtful expression in a section ranged under a particular heading.

"The heading to the 6th, and all the subsequent sections down to the 30th, and including, of course, the 16th, is, 'And with respect to the construction of the railways and the works connected therewith, be it enacted as follows.' Therefore, all the sections to which this heading applies must be taken to have been intended by the Legislature to provide for matters relating to 'the construction of the railway and the works connected therewith.'

"The 6th section seems more closely to confine its provision to these objects, for it begins by enacting, that 'In exercising the power given to the company to construct the railway and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this act and in the Lands Clauses Consolidation Act,' and then it goes on, 'and the company shall make to the owners and occupiers of all and other persons interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers by this or the special act, or any act incorporated therewith, vested in the company.'

"It was argued for the plaintiffs that the injury occasioned to the house from the vibration caused by the use of the railway came within the words 'injuriously affected by the construction thereof,' or, at all events, that it was a 'damage sustained by reason of the exercise of the power vested in the

(d) Of the judges summoned (Willes, Blackburn, Keating and Lush, JJ., and Bramwell and Pigott, BB.), Blackburn, J., was the only one who gave an opinion in favour of the company. It will be observed that Lush, J., changed his opinion.

(e) 5 H. & N. 679. That case establishes that where the Legislature has sanctioned the use of a locomotive engine there is no liability for any injury caused by using it, so long as every precaution is taken consistent with its use.

company.' Now as to the words 'by the construction thereof,' it seems to me that it would be doing violence to language (even without the limitation which is placed upon these words by the general heading to the 6th and following sections, and the context of the section itself) to extend them to any injury which is not the immediate consequence of the construction of the railway. An instance of damage of this sort occurs in this very case, for the jury gave the plaintiffs compensation to the amount of 836*l.* for obstruction of light, air, and doorway.

"To argue that, as the injury could not have occurred unless the railroad had been previously constructed, therefore it was caused 'by the construction thereof' is certainly a strong example of the illogical reasoning of '*post hoc, ergo propter hoc*,' and would extend to every accident or injury occurring upon the railway after its construction, which, of course, could not have happened if it had not been constructed.

"With respect to the subsequent words in the 6th section, 'damage sustained by reason of the exercise of the powers vested in the company,' it was argued that they embrace the claim of the plaintiffs, because the powers vested in the company are not merely for the construction of a railway, but also for the use of it after its construction, being the end and object for which it is made. But again we must refer to the heading of this and the following sections, which limit the provisions they contain 'to the construction of the railway and the work connected therewith.' And reading the words of the section with reference to those objects, we find that compensation is to be made to the owners, &c. of lands taken or used for the purposes of the railway or injuriously affected by the construction thereof, for damage sustained (not as regards such lands, but) 'by reason of the exercise, as regards such lands,' of the powers vested in the company. Now the powers vested in the company, 'as regards such lands,' are to take and use the lands for the purposes of the railway; and to say that the use of the railway after its construction is one of the powers vested in the company in regard to the lands, conveys to my mind no intelligible meaning. The 6th section of the Railways Clauses Act being inapplicable to the plaintiffs' claim, we must turn to the 16th section to see whether it affords any countenance to it. The 16th section, as already observed, is one of the sections ranged under the heading which immediately precedes the 6th section. As the words 'using the railway' are found in it, great stress is laid upon it in favour of the plaintiffs' claim to compensation. Now it must be observed that this section begins with the words 'it shall be lawful for the company for the purpose of constructing the railway or the accommodation works connected therewith hereinafter mentioned to execute any of the following works,' and then follows a specification of different works in detail empowered to be done for the purposes mentioned, ending with a general power to do 'all other acts necessary for making, maintaining, altering, or repairing and using the railway.' The section then provides, that in the exercise of the powers by this or the special act granted, the company shall do as little damage as can be, and shall make full satisfaction to all parties interested 'for all damage by them sustained by reason of the exercise of such powers.'

"The counsel for the respondents argued that this proviso comprehended every description of damage sustained by reason of the exercise of the powers vested in the company; that power is given to them by the 86th section of the act to use and employ locomotive engines upon the railway; and that the injury to the plaintiffs' house arose from the use of such locomotive engines, and therefore was sustained by reason of the exercise of the company's powers.



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Cases.**HammerSmith  
R. Co. v. Brant.*

"It appears to me that this argument claims for the proviso in the 16th section a wider application than is warranted by the purview of the section. The powers specifically conferred by it are expressly referred and limited to 'the purpose of constructing the railway.' The general power to do all other acts, &c., must be read with reference to this object. If this mode of construing the section by the context is adopted, there will be no difficulty in understanding the words 'all other acts necessary for using the railway' to mean that for the purpose of constructing the railway the defendants may do all acts necessary to enable them to use the railway. This construction appears to me to be aided by the words which are found in juxtaposition with the word 'using,' viz., 'making, maintaining, altering, and repairing,' and it seems to me rather a forced interpretation of language to say that the words 'the defendants may do all acts necessary for using the railway' mean that they may do all necessary acts *in* using the railway. I think that the proviso must be limited to the powers conferred by the section, and that it is only if in the exercise of those powers damage is sustained, that satisfaction is to be made. The section itself having empowered the defendants to perform certain works for the purpose of constructing the railway, the proviso enacts that in the exercise of the powers, &c. they shall do as little damage as can be; clearly pointing to the execution of the works to which this section relates, and confining the satisfaction to be made for damage done in exercising those powers. It appears to me that in the reasonable construction of this section it is impossible to hold that it gives any remedy to the plaintiffs for damage occasioned to their house in the course of using the railway. And there being no other legislative provisions upon which the plaintiffs' claim to compensation can be founded except the 6th and 16th sections of the Railways Clauses Act, which I have fully considered and shown not to apply to that species of injury of which they complain, I am compelled very reluctantly, in a case where real damage has been sustained, though not to a very large amount, to come to the conclusion that the Legislature has not provided for the case of these respondents, but has left them without remedy, and that the judgment of the Court of Exchequer Chamber ought therefore to be reversed."

Lord Colonsay, who had found the case to be attended with much difficulty, observed:—

"If compensation had been intended to be given for an injury of this kind, incident to the subsequent using of the railway by locomotives or otherwise, I should have expected something to be said with reference to it. I should not expect to find in the Lands Clauses Act anything with reference to the use to be made of any particular kind of works to be constructed, or of the uses that may be made of them. But in the other act, in which we have statutory enactments with regard to a particular class of public works, namely, railways, I should have expected to find something expressed with regard to claims for compensation, not merely for injury done by the construction of the works, but also for injury resulting from the subsequent use of locomotives, if such compensation had been intended to be given. I think one can see reasons why such a wide claim should not have been given; but, however that may be, I can only look at the statute itself and state the construction which I feel myself bound to put upon the statute. This question is no way affected by the circumstance of the particular lands being or not being within the limits of deviation in the special act. The claim, if maintainable at all, could not have been confined to lands within the

limits of deviation, because injury by vibration might equally be done to lands more remote, and the claim would be equally well founded if at all tenable.

"I think that when the Legislature gives powers under a particular act, the provision for compensation, in so far as intended, would be expressed in that act, and might with propriety be different according to the nature of the work to be constructed and the use to be made of it. The Legislature has not yet made clauses in regard to all kinds of public works. It has made such an act with regard to railways, and I do not find within that act what I can consider as a right to claim compensation for vibration by reason of the subsequent use of the railway when made. I therefore feel myself under the necessity of concurring in the judgment that has been suggested by my noble and learned friend."

This case was followed by *City of Glasgow Union R. Co. v. Hunter (f)* in 1870, by *Duke of Buccleuch v. Metropolitan Board of Works (g)* in 1872, and by *Caledonian R. Co. v. Walker's Trustees (h)*. In the former of these cases the jury had awarded compensation "for damage caused by the noise of trains, smoke, and general nuisance." Part of the land of the claimant had been actually taken, and it was sought to distinguish the case from *Brand's case*, in which no land had been taken, on that ground. The judgment, however, did not turn upon this distinction, inasmuch as the facts of the case showed that the claim was made while the line was yet unfinished, and no trains had yet passed along it, and also that no part of the claimant's property had been injured by anything done on his land by the company. The claim was unanimously held a bad one, and both Lord Hatherley and Lord Chelmsford appear to have thrown considerable doubts on the decision of Crompton, J., in *Re Stockport R. Co. (i)*, that the taking by the company of the land of a claimant let him in "to prove all sorts of damage for which he could not otherwise recover" (j).

In *Duke of Buccleuch v. Metropolitan Board of Works (k)*, the claimant occupied a house and garden fronting the Thames as tenant to the Crown for the residue of a term of 99 years, and was entitled to an easement over a causeway (l) and jetty with steps by which they might be approached at any state of the tide. The Thames Embankment, constructed by the defendants under a special act passed in 1862, and incorporating the Lands Clauses Act, formed a public road between the garden of the claimant and the Thames, and

(f) L. R., 2 Sc. App. 78.

(g) L. R., 5 H. L. 418.

(h) L. R. 7 App. Cas. 259, where see the previous cases reviewed, and reconciled by Lord Selborne, C.

(i) 33 L. J., Q. B. 251, and p. 226, ante.

(j) See per Bramwell, B., in *Buccleuch (Duke of) v. Metropolitan Board of Works*, L. R., 3 Ex. 328.

(k) L. R., 5 H. L. 418; 41 L. J., Ex.

187; reversing the judgment of the majority of the Exchequer Chamber, L. R., 5 Ex. 221; and restoring the unanimous judgment of the Court of Exchequer, L. R., 3 Ex. 306.

(l) By the special act the word "lands" included "easements," so that it was immaterial whether the soil of the causeway belonged to the claimant or not. L. R., 5 H. L., at p. 459, per Lord Chelmsford.

3. *Review of Cases.*

shut out the claimant from direct access to the river. The umpire awarded more than 8,000*l.* compensation, and stated that he had awarded 5,000*l.* for depreciation in value of the house as a residence. The House of Lords held that the property was injuriously affected within the meaning of the Lands Clauses Act, and the special act, and that the claimant was entitled to the whole sum awarded by the umpire. "The water-right," observed Lord Cairns, was a property "belonging to the plaintiff."

Avoidance of rule of *Brand's case* by special act.

The effect of the rule, that no compensation is ordinarily recoverable for damage caused by the working, as distinct from the construction, of the railway (which was emphatically dissented from by Lord Cairns in *Brand's case*) is avoided by sect. 39 of the Metropolitan (Inner Circle) Completion Act, 1874, in the following terms:—

"The company shall make proper compensation to the owners, lessees, and occupiers of any such premises as in the last preceding section mentioned, for any structural or other injury of the like nature which may from the execution of the works of or in connexion with the said railway No. 1, or from the working of such railway after construction, result to the same, either by the lessening of the amount of support which such premises now receive from the soil which must be removed in the execution of such works, or from the vibration or oscillation caused by the working or otherwise of the said railway No. 1, such compensation in case of difference to be ascertained according to the provisions contained in the Lands Clauses Consolidation Act, 1845: provided always, that the company shall not be liable under this section to make compensation for or in respect of any such structural or other injury as aforesaid, which shall not have occurred within three years next after the said railway shall have been completed and opened for traffic."

The three rules, that the *assessing tribunal may take into account prospective damages, that the Court may interfere on the ground of remoteness of damage taken into account, and that compensation must be assessed once for all*, may conveniently be examined together.

Prospective damages.

The rule that the assessing tribunal may take into account prospective damages (*m*) would seem to be derived from the principle that the claimant is considered as the plaintiff in an action of trespass (*n*).

In a case where the claimant was a seedsman and market gardener, and by reason of the defendants taking his garden, where he sowed trial crops, became unable to warrant his seeds, which were in consequence depreciated in value, the Court held the damage to be too remote, "though with some hesitation and difficulty" (*o*).

(*m*) In *Lee v. Afilar*, 2 M. & W. 824, it was held contra, on the construction of a special act prior to the Lands Clauses Act, which gave the claimant the peculiar right to compensation for "future, temporary or perpetual continuance of any recurring damages."

(*n*) See per Erle, C. J., in *Ricket's case*, 34 L. J., Q. B. 261, citing *Jubb v. Hull Dock Co.*, 9 Q. B. 443.

(*o*) *Clarke v. Wandsworth Board of Works*, 17 L. T. 549. See also *Utley v. Todmorden Local Board of Health*, 44 L. J., C. P. 19; 31 L. T. 445.

In *Ware's case* (p), the Court of Exchequer was of opinion that an arbitrator ought not to award compensation for future damage, on the ground that the claimant might proceed again for compensation under the 68th section of the Lands Clauses Act, "which was expressly provided to meet such a case."

In a more recent case (q), Cockburn, C.J., expressed a decided opinion against a second compensation for unforeseen damage, while Crompton and Mellor, JJ., hesitated to go so far, and limited the exclusion of a second compensation to damage which might have been foreseen at the time of the first inquiry.

In a still more recent case (r), an agreement had provided that the purchase-money of the claimant's land should also be taken "in full compensation for all damage by severance to adjoining land, and also for injuriously affecting such lands." It was held that the agreement covered structural injury to houses not taken by the company, and Bovill, C.J., after reviewing the cases, observed that "always in his experience at the bar these matters had been settled once for all." That the naked point, whether a second assessment can be had or not, has never been conclusively decided, may perhaps be accounted for by the circumstances—first, that companies usually provide for the difficulty beforehand by comprehensive agreements, and secondly, that it is so hard to say that the damage could not have been foreseen. It is submitted that the point, when it arises for decision, cannot fail to be decided in favour of the companies, looking to the reasoning of Cockburn, C.J., in *Croft v. L. & N. W. R. Co.* (q), and of Bramwell, L.J., in *Stons v. Mayor of Yeovil* (rr), and to the following dictum of Lord Wensleydale, in *Caledonian R. Co. v. Lockhart* :—

"The price should be a full compensation once for all. When paid, the company have obtained a lawful right to construct their works; and if they happen to injure one in the reasonable exercise of rights so purchased, they are irresponsible for such injury. Those rights are given for the public good, and if an extraordinary unforeseen damage occur, the suffering party must bear it, and is without remedy" (s).

The right of the claimant is ordinarily to recover compensation in respect of the value of the premises to him, not in respect of their value when taken by the company. On this principle a landlord,

Measure of damages.

(p) 9 Exch. 395.  
(q) *Croft v. L. and N. W. R. Co.*, 32 L. J., Q. B. 120.  
(r) *Todd v. Metropolitan R. Co.*, 24 L. T. 435. See also *Lawrence v. Great Northern R. Co.*, 16 Q. B. 648; *Brine v. Great Western R. Co.*, 2 B. & S. 402; *Lancashire and Yorkshire R. Co. v. Evans*, 15 Beav. 322 (A.D. 1851), in which latter case Romilly, M. B., held that a submis-

sion to arbitration as to compensation did not preclude a landowner from proceeding to recover a further compensation for damages unforeseen at the time of the submission.

(rr) L. R. 2 Q. P. D. pp. 111, 113.

(s) 6 Jur., N. S. 1314 (A.D. 1860), not cited in *Croft v. L. & N. W. R. Co.* (A.D. 1864), or in *Todd v. Metropolitan District R. Co.* (A.D. 1871).

3. *Review of Cases.*

Ecclesiastical property.  
*Stebbing v. Metropolitan Board.*

who was a brewer, was held entitled to the value of a restrictive covenant by his tenant to sell the landlord's beer only (t).

So, where property devoted to spiritual uses is taken by a company the amount of compensation is not the value of the property for secular purposes, inasmuch as, without a statute, it could never have been alienated to those purposes. This was held in *Stebbing v. Metropolitan Board of Works* (u). There the plaintiff was rector of three parishes in London, in the churchyards of which burials were prohibited. The defendants took the whole of one and part of the other two churchyards, and used the land so taken partly in forming a new street and partly for the erection of buildings. The rector contended that as the lands were divested of their ecclesiastical character the arbitrator was bound to ascertain the value of the lands as if they were applicable to any purpose to which their owner might apply them. The board contended that their act could confer no additional value on the lands in the hands of those from whom they were purchased. And the Court gave judgment for the board, Cockburn, C.J., observing that it could never have been intended that because a person has a freehold interest he should be compensated in respect of that freehold interest without reference to the character of the land.

Contingent damages for prospective value.

But where there is a probability that land taken will be more valuable in future, contingent damages may be assessed in respect of such future value. Thus, where a company took lands on which cotton-mills would probably have been built, and the owner had other land on which he had built a reservoir from which water might be supplied to such mills when built, it was held that an umpire rightly received evidence as to the profits which might have been derived from supplying the water to the mills (x).

Future damage from future injury.

*Reg. v. Poulter.*

In *Reg. v. Poulter* (xx), however, Fry and Bowen, L.JJ., laid down that compensation for prospective injury to result to property from a future exercise of the statutory powers could not be recovered, distinguishing between future damage resulting from future injury for which compensation could not be recovered, and future damage resulting from past injury, for which it could.

4. *Mines.*

Compensation in respect of damage done to mines.

B. C. Act, ss. 77-86.

4. *Compensation in respect of Mines.*

Special provisions are made in the Railways Clauses Act as to the compensation to be paid in respect of mines.

(t) *Bourne v. Mayor of Liverpool*, 33 L. J., Q. B. 15.

(u) L. R., 6 Q. B. 37; 40 L. J., Q. B. 1, distinguishing *Ilkecoot v. Archbishops of Canterbury and York*, 10 C. B. 327; 19

principle of assessment was laid down by Lord Truro, C., under a special act.

(x) *Ripley v. Great Northern R. Co.*, L. R., 10 Ch. 435, affirming *Jessel, M. R.*, (xx) L. R. 20 Q. B. D. 132, C.A. and

The company are not entitled to "mines of coal, ironstone, slate, or other minerals" (which terms include minerals got by open workings, such as common stone (*y*), clay (*z*), as well as those got by underground excavation (*v*), under lands purchased by them, except such part as shall be necessary to be used in the construction of the works, unless the same shall have been expressly (*aa*) purchased (whether by agreement or compulsorily (*b*)), and such mines are deemed to be excepted out of the conveyance: (Sect. 77 (*d*)). If the owner, &c. of mines under the railway, or within the prescribed distance therefrom, be desirous of working them, he must give notice to the company, who may then make compensation for the mines (the amount to be settled as in other cases of disputed compensation); and the mines cannot be worked: (Sect. 78.) Under this section it is not necessary that the owner, &c., should be desirous of working the mines himself, and it is enough that he should be *bond fide* desirous of working them either himself or by a lessee (*d*). If the company do not treat, the owner may work the mines in the manner particularly prescribed; and any damage or obstruction to the railway or works, by improper working, must be made good by the party who works the mines: (Sect. 79.) Airways, headways, gateways, or water levels, may be made by the owners of mines, in the manner prescribed (sect. 80); and the owners of the land through which they are made are entitled to compensation: (Sects 81, 82.)

The company are required, from time to time, to pay to the owner, lessee, or occupier of any mines, extending so as to lie on both sides of the railway, all such additional expenses (*e*) as shall be incurred by such owner by the severance of the lands over the mines, or by the continuous working of the mines being interrupted or by the same being worked so as not to injure the railway, and for any minerals not purchased by the company, which cannot be obtained by reason of making and maintaining the railway;—any dispute touching the amount of loss to be settled by arbitration: (Sect. 81.)

The company may, after notice, enter mines, and may use all necessary means to discover the distance from the railway to the mines (sect. 83); and if they are refused admission to the mines, a penalty

(*y*) See *Midland R. Co. v. Checkley*, L. R., 4 Eq. 19.

(*z*) *Loosemore v. Tiverton and North Devon R. Co.*, L. R., 22 Ch. D. 25; 51 L. J., Ch. 570; 47 L. T. 151; 30 W. R. 628—per Fry, J.

(*aa*) *Midland R. Co. v. Haunchoood Brick and Tile Co.*, L. R., 20 Ch. D. 582; affirmed in *Midland R. Co. v. Robinson*, *infra*.

(*aa*) This applies, even though the land may have been taken at a high price as building land, *Metropolitan District R. Co. and Cotton's Trustees, Inre*, 45 L. T. 103, C.A.

(*b*) *Errington v. Metropolitan District*

*R. Co.*, L. R., 10 Ch. D. 559; 51 L. J., Ch. 305; 46 L. T. 443; 30 W. R. 663, C.A.

(*c*) For construction of this section as incorporated in a Canal Extension Act, see *Birmingham Canal Co. v. Charterright*, L. R., 11 Ch. D. 421.

(*d*) *Midland R. Co. v. Robinson*, L. R. 37 Ch. D. 386—C. A., affirming judgment of Chitty, J.

(*e*) As to what description of expenses and losses may be recovered, see *Dand v. Kingscote*, 2 Railw. Cas. 27; *Whitehouse v. Wolverhampton and Walsall R. Co.*, L. R., 5 Ex. 6; 39 L. J., Ex. 1.

4. *Mines.*

Compensation  
to lessee makes  
the company  
owners.

*G. W. R. Co. v.  
Smith.*

Rights of parties  
regulated solely  
by statute.

*G. W. R. Co. v.  
Bennett.*

is incurred by the refusal: (Sect. 84.) If mines are worked contrary to the aforesaid provisions, the company may require the owner to construct such works, and adopt such means, as may make the railway safe; and, in case of refusal, may themselves construct such works, and recover back the expenses thereof: (Sect. 85.)

If a lessee has received compensation for ceasing to work, all right of the lessor to work is gone. The effect of compensating the lessee is to make the company owners of the mines in perpetuity. This was decided in *Great Western R. Co. v. Smith* (*f*), in which the effect of the series of sections was carefully considered by the Court of Appeal. In that case a lessee who had received compensation surrendered his lease before its expiration. The lessor sold the mines to the defendant, who recommenced working. The company obtained a perpetual injunction to restrain the working, but without prejudice to the right of the lessor to obtain the compensation to which the court intimated that he was entitled under the 6th section of the Railways Clauses Act, and the decree of the Court of Appeal was, with a slight variation, confirmed by the House of Lords (*g*). It had been previously held by the House of Lords, in *Great Western R. Co. v. Bennett* (*h*), that the statute creates a sole and specific law for the regulation of the respective rights of the railway company and the parties interested in the mines. A railway company, therefore, which has purchased lands beneath which mines lie, cannot claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support. So long as the working be according to the custom of the district, the mines may be worked both up to and under the railway. But the parties interested in the mines, if the company do not purchase, cannot pass *over* the railway; that is a trespass restrainable by injunction; and the remedy is to claim extra compensation for the expense caused by tunnelling (*i*). The minerals may be worked by open workings (*h*).

The cases referred to in the note below have also been decided upon the rights of owners of mines and minerals and their lessees to receive compensation for loss of profit, &c., caused by the construction of railways and canals (*l*).

(*f*) L. R., 2 Ch. D. 235; 34 L. T. 367, reversing Hall, V.-C., L. R., 2 Ch. D. 288.

(*g*) L. R., 3 App. Cas. 165.

(*h*) L. R., 2 H. L. 27; 36 L. J., Q. B. 133; distinguishing *Caledonian R. Co. v. Sprot*, 2 Macq. 449, and *Elliot v. North Eastern R. Co.*, 10 H. L. C. 333; 32 L. J., Ch. 402, as turning upon special acts prior to the Railways Clauses Act, 1845, and impliedly affirming *Fletcher v. Great Western R. Co.*, 29 L. J., Ex. 253; 5

H. & N. 689; 6 Jur., N. S. 961, in Exch. Chamb.

(*i*) *Midland R. Co. v. Miles* (No. 1), L. R., 30 Ch. D. 684; 55 L. J., Ch. 251; 53 L. T. 381; 34 W. R. 136, per Pearson, J.

(*k*) *Midland R. Co. v. Miles* (No. 2), L. R., 33 Ch. D. 832; 55 L. J., Ch. 745; 55 L. T. 428; 35 W. R. 76, per Stirling, J.

(*l*) *Caledonian R. Co. v. Lord Belhaven*, 3 Macq. 56; *Swindell v. Birmingham Canal Navigation Co.*, 29 L. J., C. P. 364;

It has been held (m) that a railway company having purchased land for the purposes of their railway, under the Lands Clauses Act and the Railways Clauses Act, by a conveyance in the usual statutory form, in such cases is not entitled to exclude the owners of the mines from working them without paying compensation, and such compensation having been assessed regularly under the acts, the owners may recover the amount in an action. And Pollock, C.B., said,—

Recovery of compensation money by action.  
*Fletcher v. Great Western R. Co.*

“The construction of the clauses in the act is clear, that unless the mines and minerals are expressly purchased they shall be deemed to be excepted out of the conveyance. They were *not* so purchased: the conveyance is in the form given by the act, consequently the company have taken the land as if the mines and minerals were excepted. They belong, therefore, not to the company, the owners of the surface, but to the owners of the *land*. The 78th section enacts, that the mines near the railway shall not be worked if the company are willing to purchase them. In that respect it puts all the world on the same footing, whether they are grantors or strangers. But if the company are unwilling to purchase them, then the owners may work them, which means, that if the company desire to exclude the owners from working the mines they can, by taking the proper course, do so. If they do not, then they may go on working the mines without doing unnecessary damage.”

Where a company purchased land to form a railway, all minerals being reserved to the vendor, and no claim was then made by him for compensation in respect of future damage which might result, it was held that when the works of an adjoining colliery belonging to the vendor approached the land on which the railway was made, the lessee of the colliery could not claim compensation; as the extent of the colliery was capable of being known at the time of the purchase of the land, and the claim ought then to have been brought forward (n).

Future damage to mines.  
*R. v. Leeds and Selby R. Co.*

And in a case (o) in which a colliery was inundated with water in consequence of a railway company having diverted the course of a brook, it was held that the owners of the colliery were entitled to compensation; and that the damage having been partly done under the powers of an act of Parliament, and partly not, the proper remedy was by a mandamus to compel the company to assess compensation.

Colliery inundated by diversion of brook.  
*R. v. North Midland R. Co.*

*L. and N. W. R. Co. v. Ackroyd*, 31 L. J., Ch. 588; *North Eastern R. Co. v. Crossland*, 32 L. J., Ch. 553; *Barker v. Nottingham and Grantham R. Co.*, 33 L. J., C. P. 193.

(m) *Fletcher v. Great Western R. Co.*, 28 L. J., Ex. 147; 29 L. J., Ex. 253;

4 Ll. & N. 242; 5 Ll. & N. 689, affirmed in *G. W. R. Co. v. Bennett*, p. 240, ante.

(n) *R. v. Leeds and Selby R. Co.*, 3 Ll. & E. 683.

(o) *R. v. North Midland R. Co.*, 2 Railw. Cas. 1. See also *Lister v. Lichley*, 7 Ll. & E. 121.



4. *Mines.*

Distinction  
between right  
to compensation  
and right of  
action.

*Bagnall v. L. and  
N. W. R. Co.*

The following case (*p*), in which a mine-owner recovered damages against a railway company for not sufficiently keeping off water from his mine, illustrates the distinction between the right to compensation and the right of action. The facts sufficiently appear in the judgment, delivered by Bramwell, B. :—

“The material facts of this case are as follows :—The plaintiffs are owners and occupiers of a coal-mine : the surface soil as well as the coal below formerly belonged to the same owner, but a railway company (to whose rights and obligations the defendants have succeeded) took the surface, under the powers of a special act of Parliament, for their railway, and constructed it thereon. The railway company (by which may be understood indifferently the original company or the defendants) cut and removed upwards of twenty feet in thickness of the surface over where the plaintiffs' mine now is, to get the level at which they laid their rails ; this surface soil was clay impervious to water ; by removing it a porous rock was reached ; the soil was in like manner cut away by the railway company along the length of the line to a district of country through which a brook flowed ; here the railway was on or above the natural level of the ground ; it was carried over the brook by a flat bridge ; the line of railway sloped downwards from the bridge to a part over the plaintiffs' mine ; the bridge was sufficient to let the ordinary water of the brook pass, and even more, but was found an impediment to the passage of more in large floods ; the railway company was bound to make and maintain drains, the obligation being the same as in the Lands Clauses Consolidation Act. A flood happened in 1860, and the result of the combined acts of the company was, that water, part of which would have escaped but for the bridge, flowed down the railway, and the high ground between the brook and the surface over the mine being removed, it reached that spot, and the high ground and protection of clay then being gone, and the drains being imperfect as after mentioned, it permeated into the mine ; so also did the water falling on the spot itself and the springs arising in the cutting. But it here becomes necessary to mention, that when the railway was making, the mines were not worked under nor within forty yards of the railway ; the railway was made with drains at the side, sufficient to carry off the water which fell or came there without doing any mischief as matters then stood ; when the plaintiffs' workings came to forty yards from the railway, they gave the defendants notice under the local act, which may be treated as substantially the same in its provisions as the Railways Clauses Consolidation Act. The defendants, however, did not purchase the mines. The plaintiffs accordingly worked on, and when their workings came under the railway, from no fault or negligence of theirs, but as a natural consequence of fair and lawful working, the railway sank and continued to do so from time to time. The defendants repaired this by throwing material of a porous character on the sunken parts ; they did not, however, repair and puddle the drains, which from the sinking of the soil became inefficient, and even had they been efficient, they would not have carried off the flood water of August, 1860. For the damage sustained from the water thus getting into the mines, this action was brought. It seems to us impossible to state these facts, without showing that the plaintiffs have a claim on the defendants of some kind. Without any fault of theirs the natural condition of things had been altered. The water of the brook, which flowed at

(*p*) *Bagnall v. L. and N. W. R. Co.*, affirmed 31 L. J., Ex. 480 ; 1 H. & C. 31 L. J., Ex. 121 ; 7 H. & N. 423 ; 514.

a distance of one-third of a mile from their mine, inaccessible to it by being separated from it by ground twenty-five feet high, has been diverted over it; its natural covering and upper soil having been removed from it. From the last-mentioned circumstance, and the want of efficient drains, the rain which fell upon it and the springs which rise in the cuttings have got into it. These are the acts of a railway company alone. It is said that the plaintiffs have brought about the mischief by working their mines, but they have a right to work them as they did. They lose no right by doing so. It could not be contended, that had the defendants thought fit to agree to purchase, they could have done so at a nominal price, on the plea that if the plaintiffs worked them they would be worthless, as they would be drowned. We do not say that the defendants were bound to restore the surface; they might have diverted their line and left hollows over the spot in question, but they were bound by their act to make and maintain effectual drains. This reasoning applies to water other than at the time of the flood. As to that, the plaintiffs' case is still clearer. Suppose, instead of the defendants' railway passing through a cutting and over a brook, it had been a branch railway belonging to a private proprietor and joining the defendants' railway just before reaching the plaintiffs' mine, would not such a private proprietor have been clearly liable to this action? and if so, why are not the defendants? As to the flood-water, they are not sued merely as a railway company who have taken the surface of the plaintiffs' land, but as persons who, by their acts on lands at a distance, have done this injury; and it seems to us they would be liable for the damage by flood-water, if the plaintiffs had continued owners of the surface, and for some reason had thought fit to remove it to the depth the railway company has here, for it would still be the acts of the defendants that sent the water there. But it was suggested, that if the plaintiffs had a claim, it was to be enforced under the compensation clauses. We think not. The plaintiffs are not injuriously affected by the works of the railway company. Supposing the company had possessed no statutory powers, they could not have been restrained by injunction from executing any of those works, nor could any action have been maintained against them simply for their construction. The railway company would have been entitled to say these are not injuries and never will be. By means of puddling the surface and drainage, no water will ever reach you, nor need it as appears. It is not, therefore, the works intrinsically which injuriously affect the plaintiffs, but the defendants' wrong conduct in relation to them in not making and maintaining outlets for the flood-water or damming it off the plaintiffs' land, or covering the surface thereof with clay, and in not maintaining those drains which were efficient to carry off the rain which fell, and the spring water which arose there. Our judgment, therefore, is for the plaintiffs in respect of both of these claims."

#### 5. Compensation in respect of Lands held on Lease.

5. Leaseholds.

The right of tenants or lessees of lands, &c., to compensation for damage or injury to the lands in their occupation by the construction of railways(*q*), depends on the Lands Clauses Consolidation

L. C. Act,  
ss. 119-123.

(*q*) The tenant is entitled to compensation before the company take possession.

*Ingr. v. Birmingham, Wolverhampton and Stour Valley R. Co.* 3 D. G., M. & G. 658.

5. *Lands Clauses*

Act (r), and the sixth and sixteenth sections of the Railways Clauses Consolidation Act (s). The mode of assessing and recovering compensation is pointed out by sections 119—122 of the Lands Clauses Consolidation Act.

By sect. 119, where part only of lands comprised in a lease is required by the company (as will usually be the case), the rent is to be apportioned between the part so required and the residue, by agreement between the lessor and lessee on the one part, and the company on the other part, the apportionment to be settled by two justices in case of difference, and the covenants of the lease are to remain in force in respect of the part not taken. By sect. 120 the lessee is entitled to compensation for any damage resulting from the severance.

By sect. 121—

Compensation  
to tenants from  
year to year.

"If any such lands shall be in the possession of any person having no greater interest therein than as a tenant for a year or from year to year (t), and if such person be required to give up possession of any lands so occupied by him (u) before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands and for any just allowance which ought to be made to him by an incoming tenant and for any loss or injury he may sustain, or if a part only of such lands be required compensation for the damage done to him in his tenancy by severing the lands held by him or otherwise injuriously affecting the same, and the amount of such compensation shall be determined by two justices in case the parties differ about the same (v); and upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the promoters of the undertaking or to the person appointed by them to take possession thereof any such lands in their possession required for the purposes of the special act."

By sect. 122, where compensation is claimed in respect of any unexpired term under any lease, the production of the lease may be required, and if it be not produced, or the best evidence of it, the claimant is entitled to compensation as tenant from year to year.

Under these provisions the company are bound to deal independently with the lessee and the reversioner. The lessee has a right to say, "Deal with me;" and so the reversioner has a right to say with respect to his interest, "I have nothing to do with the lease; mine is a reversion expectant on the expiration of the lease" (x).

(r) 8 & 9 Vict. c. 18, Vol. II., "Statutes," &c.

(s) 8 & 9 Vict. c. 20, vol. II.

(t) These words include the interest in the last ven of a term. *R. v. Good Northern R. Co.*, L. R., 2 Q. B. D. 151, 16 L. J., Q. B. 1; but not an interest created by an agreement for a lease and entry of the tenant. *Southam v. Metropolitan R. Co.*, 1 H. & M. 514.

(u) See form of notice, vol. II., tit. *Forms*. Where a notice to quit is merely given, the tenant is not entitled to the

L. J., M. C. 208; L. R., 1 Q. B. 529. A verbal sub-lease, for so long as the mesne landlord's interest should continue, or for a shorter term at tenant's option, was held to constitute the sub-lessee more than a tenant from year to year. *In re King*, L. R., 16 Eq. 521. The precariousness of an occupation only affects the quantum of compensation. See *Holt v. Gastlight and Colden's*, L. R., 7 Q. B. 728; 41 L. J., Q. B. 351.

(v) See post, Ch. vi., Sect. 1.

(x) Per Kindersley, V.C., in *Brandon v. London & North Western R. Co.*, 49 Q.

Neither the jury nor an arbitrator have power to determine whether the tenant is entitled to the interest he claims; their function is merely to ascertain the *value* of the interest claimed. If too large an interest is claimed the Court will settle the question when proceedings are taken to recover the amount awarded (*y*).

A right for directors of a company to use a board-room at certain times, and for a clerk to use a desk in an office for certain purposes, does not constitute a tenancy (*z*).

Use of board-room by directors of company.

In *Reg. v. Poulter*, tenants, who were printers and coloured paper merchants, held upon a lease for seventeen years, determinable at the end of the first three years, at the option of the tenants. The works of a company threatening obstruction of light, the tenants, having first determined their lease after offering an assignment to the company without success, were held by a Divisional Court entitled to compensation—under the heads of difference between rent of old and new premises, refitting new premises, costs of removal, costs of new lease, and damage to business—assessed on the footing that they had lost fourteen years of enjoyment of the premises, although they had determined the lease by their own act (*a*); but the court of appeal reversed this decision, and held (1) that the termination of the lease not being the natural result of the acts of the company, but a free exercise of will on the part of the lessees, they could not recover compensation on that footing; and (2) (*b*) that the damages of the lessees would, from the date of the determination of the lease, arise from future injury only, so as not to be the proper subject of compensation (*c*).

Quantum of compensation where lease determined by exercise of tenant's option and new premises removed to.  
*Reg. v. Poulter*.

The compulsory purchase has been said to free the lessee from all covenants. In one case Lord Romilly, M. R., decreed specific performance of a contract to purchase leasehold land held under a covenant not to assign without leave of the lessor, notwithstanding that such leave had not been obtained, the necessity for the licence to assign being held to be superseded by the Lands Clauses Act (*d*). Similarly, where leasehold lands were held under a covenant by the lessor not to build or permit assigns to build upon a paddock fronting the demised land, and a railway company took the paddock and built a station upon it, the Court of Queen's Bench, in a considered judg-

Particular covenants.

(*y*) *Brandon v. Brandon*, *ubi supra*, and see *Ex parte Cooper*, 31 L. J., Ch. 373; *Bogg v. Mulford R. Co.*, 38 L. J., Ch. 410, in which latter case the company disputed a right of renewal, and the tenant established it in the Court of Chancery, on the ground that the Lands Clauses Act contains no machinery for settling such a question.

(*z*) *Municipal Freehold Land Co. v. Metropolitan and District Railways Joint Committee*, 1 C. & E. 184, per Cave, J.

(*a*) *Reg. v. Poulter*, 56 L. J., Q. B. 581; 57 L. T. 488; per Lord Coleridge, C. J., and Denman, J.

(*b*) Per Fry and Bowen, L. J.J.

(*c*) *Reg. v. Poulter*, L. R. 20 Q. B. D. 132; 57 L. J., Q. B. 133; 36 W. R. 117; C.A. The compensation had been assessed by the jury in the alternative at £3,000 or £150.

(*d*) *Slipper v. Tottenham and Hampstead Junction R. Co.*, L. R., 1 Eq. 112; 36 L. J., Ch. 841; see *Wadhams v. Marlton*, 8 East. 314.

5. Lesseholds.

ment, held that the lessee could not recover from the lessor for breach of covenant, and that it made no difference whether the company were compelled or only empowered to build the station on that particular spot (e). In giving judgment the Court observed :—

“The solution of the case appears to be, that the plaintiff is one of a numerous class of persons injured by the construction of a railway, for whom the Legislature has not provided compensation. This may be illustrated by reference to the special damage claimed in the declaration. It is there alleged that the amenity and comfort of the land demised have been diminished by reason of the prospect therefrom being interfered with, and by being overlooked by the windows of the station, with the appurtenances, including water-closets and urinals. These are heads of damage for which railway companies are not in ordinary circumstances bound to give compensation, but for which the defendant would be liable in an action on his covenant.”

Compensation in respect of covenants.

It is to be remarked upon this case, that the covenant was to do something not upon the land demised but upon other land. If the covenant had been to do something on the land demised, and the land demised had been taken or injuriously affected, the covenantee, whether lessor or lessee, could have recovered compensation from the company. It has been held, for instance, that the landlord of a public-house, whose tenant was bound by covenant to sell the landlord's beer only, was entitled to compensation for being deprived of the benefit of the covenant by the public-house being taken (f).

Public-house.

In *Harding v. Metropolitan R. Co.* (g), Lord Hatherley, C., compelled a company which had purchased a leasehold, and had been admitted by the lessee into possession, to take an assignment, and observed :—

“As to the abstract principle, I have no doubt that a company purchasing a leasehold interest as this company has done, is bound to take an assignment and bound to enter into an engagement to indemnify the vendor against the covenants of his lease. It would be a grievous injustice to take property by force from a man who was unwilling to dispose of it, and to leave him subject to a substantial rent of £600. a year, and to the other covenants and conditions of his lease.”

Lessee not freed from covenants by notice to treat.

But the lessee is not freed from all his covenants by the service upon him of a notice to treat, and the lessor may recover substantial damages in respect of breaches of a covenant for repair committed after the notice to treat, but before the assignment to the railway company. The proper measure of damages is the amount by which the reversion has become deteriorated at the date of the company taking possession (h).

(e) *Bailey v. D. Crespien*, L. R., 4 Q. B. 180; 38 L. J., Q. B. 98.

(f) *Horne v. Corporation of Liverpool*, 33 L. J., Q. B. 15.

(g) L. R., 7 Ch. 151, reversing Romilly, M. R., ib. p. 156; 41 L. J., Ch. 371.

(h) *Mills v. East London Guardians*, L. R., 8 C. P. 79; 42 L. J., C. P. 46.

It has been held in one case, that the company must serve notice upon a new tenant coming in after notices served upon the owner without the knowledge of such new tenant (i). But an interest created by the owner after notice to treat has been served upon him is no subject of compensation (k).

The terms of sect. 68 are indeed very general, and if that section stood alone it would include every case in which compensation could be claimed, including the case of a tenant at will or from year to year. But the application of it is restricted by the subsequent clauses, which make express provision for certain cases, and in those cases the mode of proceeding must be that which is pointed out by the section specially applicable. Where, therefore, a person has no greater interest in premises *actually required* by the company than as tenant for a year or from year to year, he is (in the absence of any agreement to refer the matter to arbitration which would be binding (l)) confined to the remedy given by sect. 121, viz., the determination of two justices, and is not entitled to have his claim settled by arbitration under sect. 68 (m). But the case of a tenant from year to year, the possession of whose property is not wholly or partially required to be given up, but is merely *injuriously affected* by the execution of the works of a railway, is within the large words of the 68th section, and not within the restrictive words of the 121st section (n). Such a person may therefore proceed to assess the compensation to which he is entitled under sect. 68.

How far sect. 68 applicable.

In cases, however, within the limits of the Metropolitan Railway Act, it was, to meet this difficulty, specially provided (o) that—

Cases within limits of metropolitan railway acts.

“All claims for compensation made upon the company under the provisions of the acts relating to the Metropolitan Railway, or any of them, or any act incorporated therewith, shall, if the person claiming to be entitled to compensation has no greater interest than as tenant for a year or from year to year, in the lands in respect of which the compensation is claimed, be determined in manner provided by the 121st section of the Lands Clauses Consolidation Act, 1845.”

There were similar provisions in acts passed in 1864 (p), relating to the Metropolitan, the North London, and the Great Eastern

(i) *Carter v. Great Eastern R. Co.*, 9 Jur., N. S. 618; 8 L. T. 197.

(k) *Re Murrelbone Improvement Act*, L. R., 12 Eq. 359; 40 L. J., Ch. 697; and see *Carnochan v. Norwich and Spalding R. Co.*, 26 Beav. 169.

(l) *Gillies v. South Staffordshire R. Co.*, 7 Exch. 5; *R. v. Manchester, Sheffield & Lincolnshire R. Co.*, 4 E. & B. 88.

(m) *R. v. Manchester, Sheffield and Lincolnshire R. Co.*, 4 E. & B. 88, where the schoolmaster of a free grammar school was held within sect. 121. *Knapp v. London, Chatham and Dover R. Co.*, 32 L. J., Ex. 236. It has been held, in *He-*

land, that a landlord has no lien upon his tenant's compensation money, if paid into Court. *Ex parte Carey*, 10 L. T., O. S. 37. See also *Ex parte Killyn*, 12 Ir. Eq. R. 395. And as to the tenant's costs, *Murgis of Droghda v. Great Southern and Western R. Co.*, 12 Ir. Eq. R. 103.

(n) *R. v. Sheriff of Middlesex*, 31 L. J., Q. B. 261.

(o) 26 & 27 Vict. c. clxx. s. 18. It will be observed that the section is prospective, so that its provisions apply to extension acts passed after 1864.

(p) See them referred to, post, Ch. VI., Sect. 1.

Failure of company to proceed on a six months' notice.

**Railways.** The special act sometimes contains a clause providing that the company before taking a tenement must give six months' notice to the person whose name is on the rate-book as assessed to the poor-rate. A notice under such a clause binds the company to proceed with the purchase of the tenement within a reasonable time after the expiration of the six months, and a tenant taking new premises in consequence of the notice given, but having to continue to pay rent for the old ones by reason of the failure of the company to proceed, may recover substantial damages from the company (*q*). But a tenant continuing his business, will not be entitled to compensation in respect of a reduction of profits, consequential upon a demolition of the surrounding neighbourhood by the company, arising after the expiration of the notice (*r*). It seems that a tenant under such circumstances is entitled to compensation at the least for the difference between the position of a tenant at sufferance and that of a tenant with a right to retain possession till a fixed period (*s*). The length of the interest is calculated from the date of the notice (*t*).

Cases before the Lands Clauses Act.

As there are comparatively few reported cases upon the construction of the sections of the Lands Clauses Act as to lessees, it is now proposed to lay before the reader some few cases which have arisen under other special acts of a similar nature. Several cases arose upon the construction of the act incorporating the Hungerford Market Company. That act gave compensation to any tenant from year to year who might sustain injury "in respect of any interest whatsoever, for goodwill, improvements, tenants' fixtures, or otherwise;" and it was held, that a tenant from year to year, whose tenancy had been put an end to by a legal notice to quit, was entitled to compensation, it appearing that she had been many years in possession under an assurance from her landlord that she should hold the premises as long as she paid her rent. But where a tenancy was for one year, determinable at three months' notice, ending with the year, with a stipulation against underletting, except with the lessor's leave, it was held that no compensation was recoverable (*u*).

*Ex parte Furlow*, Tenant & legally derelict.

*R. v. Hungerford Market Co.*

And where a lessee for years, whose term had expired, obtained leave from the company to hold the premises until they were wanted, it was held that his undertenant from year to year was entitled to receive compensation, when he quitted possession (*x*).

(*q*) *Morgan v. Metropolitan R. Co.*, L. R., 4 C. P. 97; 38 L. J., C. P. 57, Ex. Ch.

(*r*) *Reg. v. Vaughan*, L. R., 4 Q. B. 190; 38 L. J., M. C. 49.

(*s*) *Cumwall v. Mayor of London*, L. R., 5 L. 284; 40 L. J., Ex. 193, Ex. Ch., distinguishing *Reg. v. London and South-*

*ampton R. Co.*, 10 A. & E. 3, as being decided on special facts.

(*t*) *Thorn v. Mayor of London*, L. R., 7 C. P. 15; 41 L. J., C. P. 6.

(*u*) *Ex parte Furlow*, 2 B. & Ad. 311.

(*x*) *R. v. Hungerford Market Co. (Ex parte Still)*, 4 B. & Ad. 592.

In another case (y) P. held premises under an agreement for one year, and afterwards to quit on three months' notice at any quarter-day. He was not to underlet or give up possession to another, or make any alterations, without consent of his landlord, and was to leave for his landlord's benefit all improvements or additions made during his occupation. He made certain improvements, and was afterwards ejected upon due notice to quit: it was held that he was not entitled to compensation for such improvements under the Hungerford Market Act.

*Re Palmer and same Co.*

And, under the same statute, the assignee of a lessee for years was also held to be entitled to compensation for the loss of his chance of a renewal of the lease; but not for losses incurred in respect of fixtures and improvements (z).

*R. v. Same Co.*  
Loss of chance of renewal.

In a case (u) which arose under a special railway act, by which compensation was to be paid for land, &c., taken for the purposes of the act, and also for damage, loss and inconvenience sustained by the owners or occupiers, "such damage to be settled separately from the value of the lands;" and the act also required tenants at will and lessees for years to give up the possession on notice, but gave such tenants and lessees compensation for the value of their unexpired terms; it was held that a lessee for seven years, who received due notice to quit at the expiration of the lease, was not entitled to receive compensation for the loss of his chance of a renewal, although the lease had been several times renewed by the owner, and the tenant had made improvements on the faith of a further renewal being made. And Lord Denman said,—

*R. v. Liverpool and Manchester R. Co.*

"It certainly requires very comprehensive words to include such an interest as this, if interest it be. It is merely a hope of renewal on the old terms, which, if there has been an improvement, were not likely to be granted where there would have been a competition. This is different from the case of a sale, and also from the case under the Hungerford Market Act (b), where the words antecedent to 'goodwill' had exhausted the legal interest."

In a case under a special dock act, which provided that the jury summoned to award compensation for the loss of property taken by the company should deliver their verdict for the money to be paid for the purchase of the lands required for the works, and for the money to be paid for the injury done to the lands of the party by the severance of such lands, and for the money to be paid by way of compensation for the damage occasioned to such lands by the execution of the works, whether for damage sustained before the injury or

*Jubb v. Hall Dock Co.*  
Looking out for fresh premises.

(y) *Re Palmer and Hungerford Market Co.*, 9 A. & B. 463.

(z) *R. v. Hungerford Market Co.* (*Ex parte Goshing*), 4 B. & Ad. 596.

(u) *R. v. Liverpool and Manchester R. Co.*, 1 A. & E. 650; 6 N. & M. 186.

(b) *Ex parte Farlow*, 2 B. & Ad. 341.



5. Leaseholds.

for future damage, either temporary or permanent; it was held that it was competent for the jury to award compensation for the damage "which the party will sustain by reason of his having to give up his premises as a brewer, until he can obtain suitable premises in which to carry on his business" (c).

*Ex parte Nadin.*  
Tenant not entitled to portion of compensation paid to landlord.

And it has been decided that a tenant from year to year, who has received a proper notice to quit, cannot claim any portion of the compensation paid to his landlord. This was decided upon a petition under the Lands Clauses Consolidation Act and the Manchester Market Act (d). Under the latter, the Corporation of Manchester had taken a house and land, in the occupation of D., as yearly tenant, which were the property of N., as owner of the fee. In September, 1846, N. gave D. notice to give up possession on the expiration of six months, namely, at Lady-day, 1847. On the 23rd of March, 1847, an agreement was entered into by N. with the corporation for the purchase of the premises, free from incumbrances, for 3,900*l.* D. did not give up possession of the house at the expiration of the notice, and the corporation had paid the 3,900*l.* into the Bank, according to the provisions of the Lands Clauses Act. This petition was presented by N., praying that the 3,900*l.* might be paid to him upon the execution of a proper conveyance.

D. contended that, as his tenancy was interrupted in consequence of the premises being required by the corporation, he was entitled to receive part of the compensation money.

The petition was first heard before the Vice-Chancellor, who ordered that a sum of money should be paid to D., on account of his claim to compensation, and for his fixtures, &c., together with his costs, and that the residue of the 3,900*l.* should be paid to N.; but upon appeal Lord Cottenham said,—

"D. had not shown any right to remain in the occupation of the property after the expiration of his tenancy, which was determined by the notice, and therefore he had not shown any ground for claiming compensation. The whole amount which had been paid into Court belonged to N., and the order of the Vice-Chancellor must be varied: and he ordered that, upon the execution of a conveyance to the corporation, the whole amount should be paid to N."

*Mouchet v. Great Western R. Co.*

In a case (e) in which a railway company purchased a subsisting lease of certain lands, and then gave the reversioner in fee notice that a jury would be summoned to assess compensation to him for his interest in the lands; and the reversioner who contended that the company had no authority to take more than a portion of the lands, applied for an injunction to restrain the company from summoning a jury:—the Vice-Chancellor refused the injunction.

(c) *Jubb v. Hull Dock Co.*, 9 Q. B. 443; 11 Jur. 15. (e) *Mouchet v. G. W. R. Co.*, 1 Railw. Cas. 567.

(d) *Ex parte Nadin*, 17 L. J., Ch. 421.

## CHAPTER VI.

## ON THE MODE OF ASSESSING COMPENSATION.

1. <i>By Justices of the Peace</i> . . . . .	PAGE 251	3. <i>By Arbitration</i> . . . . .	PAGE 256
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1. *Compensation assessed by Justices of the Peace.*1. *By Justices of the Peace.*

By sect. 22 of the Lands Clauses Consolidation Act, 1845, if no agreement be come to between the company and the owners of, or parties enabled to sell lands taken or required, or injuriously affected by the railway, as to the value of the lands, or the compensation to be made (*a*), and if the compensation claimed *do not exceed* 50*l.*, the same must be settled by two justices (*b*). So, with respect to the construction of the railway and works, if any lands are taken or used or injuriously affected, the Railways Clauses Consolidation Act enacts, that if the sum in dispute does not exceed 50*l.*, the compensation is to be settled in like manner (*c*). By sect. 30 of the same act, if the company enter upon any private road, and no agreement be made as to the amount of the compensation which the owners and other persons interested in the road are to receive, the difference must be settled by two justices. And by sect. 43 two justices may also, in certain cases, fix the amount of rent to be paid for the temporary use of lands.

Compensation for land of less than 50*l.* value.  
L. C. Act, s. 22.

Private road

So, where lands required to be taken by the company are in the possession of any person having no greater interest than as a tenant for a year, or from year to year (*d*), and such person is required to *deliver up the lands* before the expiration of his term, two justices are authorized by the Lands Clauses Act (sect. 121) to assess the amount of compensation (*e*).

Yearly tenant.  
Sect. 121.

In both the last-mentioned cases, the jurisdiction of the justices seems to attach, although the amount of compensation in dispute may

Where lands taken.

(*a*) The preliminary steps to be taken have been already considered, ante, Ch. IV., s. 5: "The notice to treat."

(*b*) See also sect. 68.

(*c*) See 8 & 9 Vict. c. 20, ss. 6, 16, 44, post, Appendix, taken in connection with 8 & 9 Vict. c. 18, s. 22, *supra*.

(*d*) The schoolmaster of a free grammar-school who might be turned out by two-thirds of the governors and the bishop at three months' notice has no greater inter-

est than this; and must proceed before the justices, though he claim much more than 50*l.* compensation. *R. v. Manchester, Sheffield, and Lincolnshire R. Co.*, 4 E. & B. 88. A person producing a lease, void at law but good in equity, was held not to be a yearly tenant in *Sweetman v. Metropolitan R. Co.*, 1 Hemm. & Mill. 543. And see now Judicature Act, 1873, s. 24.

(*e*) Their order need not be in writing. *R. v. Coombe*, 32 L. J., M. C. 67.

1. *By Justices of the Peace.* exceed 50%. Where, therefore, lands in the possession of a person having no greater interest than as tenant for a year, or from year to year, are taken by a railway company, the tenant *must* proceed to obtain compensation before justices and cannot proceed under sect. 68 (f).
- Where "injuriously affected." It has, however, been held that where *possession* of the lands is not required by the company, a tenant from year to year, who is "injuriously affected" cannot proceed under sect. 121, but must proceed under sect. 68 (g). To obviate the inconvenience and expense attendant upon such proceedings in the case of tenants from year to year of small houses in the neighbourhood of London, the Metropolitan R. Co. procured the insertion in their act of 1863, of the clause to which we have already adverted,\* and which was incorporated in their acts of 1864 (h); under which *all* claims for compensation, under the act relating to the Metropolitan Railway by persons who have no greater interest than as tenant for a year, or from year to year, *must* be made in manner provided by sect. 121. And there are similar provisions in many other Railway Acts passed in 1864 (i). If, in a case under sect. 121, the company agree to refer a claim to arbitration, and join in appointing an arbitrator, they cannot afterwards object that the claimant ought to have proceeded before justices under sect. 121 (k).
- In cases within the Metropolis. Two justices are also empowered to apportion the amount of rents payable in respect of copyhold lands, when only part of the lands are taken: (8 & 9 Vict. c. 18, s. 98.) And they may, under the like circumstances, apportion the amount of rent-charges, &c.: (Sect. 116.)
- \* Page 247.
- Agreement to refer claim within sect. 121. So, if lands are comprised in a lease for years unexpired, and a part only of such lands are required, the rent of the remaining portion is to be apportioned by agreement, or by two justices; and the lessee is liable only for the rent apportioned (l): (Sect. 119.) Two justices are also empowered to assess compensation under 50% for lands omitted to be purchased by mistake: (Sects. 124, 125, 126.)
- Apportionment of rents. Copyholds. Rent-charges. Leaseholds.
- Value of lands omitted to be purchased.

(f) *R. v. Manchester, Sheffield and Lincolnshire R. Co.*, *ubi supra*; *Knapp v. London, Chatham and Dover R. Co.*, 32 L. J., Ex. 236; 2 H. & C. 212.

(g) *South v. Metropolitan R. Co.*, 31 L. J., Q. B. 261.

(h) 27 & 28 Vict. c. cxxci., s. 13; c. cccxv., s. 14.

(i) See The North London Railway (Additional Powers) Act, 1864, 27 & 28 Vict. c. cxlvi., s. 23, as to claims under that act, or any acts relating to that company which have incorporated The Lands and Railway Clauses Acts, 1845, or either of them; The Great Eastern Railway (Metropolitan Station and Railways) Act, 1864, 27 & 28 Vict. c. cccxiii., s. 3, The

Metropolitan District Railways Act, 1864, 27 & 28 Vict. c. cccxiii., s. 82. Where a special act, incorporating sect. 121 of The Lands Clauses Act, provided that six months' notice must be given by a company of their intention to take, it was held that the tenant's interest was to be calculated from the date of the notice, and that he was entitled to a jury. *Tyson v. Mayor of London*, L. R., 7 C. P. 18; 41 L. J., C. P. 6.

(k) *Hollins v. South Staffordshire R. Co.*, 7 Exch. 5; *R. v. Manchester, &c. R. Co.*, *ubi supra*, n. (d).

(l) As to specific performance of an agreement for apportionment, see *Williams v. East London R. Co.*, 21 L. T. 524.

In order to give the justices jurisdiction, they must be acting justices for the county or city, &c., where the matter requiring their cognizance arises, and *not be interested (m)* in the matter; and if the question arises in respect of lands situate not wholly in any one county or city, &c., justices for the county or city, &c., where any part of the lands are situate may act; and, in all cases, the two justices must be assembled and acting together (n): (Sect. 3.)

Qualifications of justices.

The following is the mode of proceeding directed by the Lands Clauses Act, s. 24, in all cases of disputed compensation authorized to be settled by two justices:—

Procedure before justices.

It shall be lawful for any justice, upon the application of either party, with respect to any question of disputed compensation by this or the special act, or any act incorporated therewith, authorized to be settled by two justices (o), to summon the other party to appear before two justices, at a time and place to be named in the summons, and upon the appearance of such parties, or in the absence of any of them, upon proof of due service of the summons, it shall be lawful for such justices to hear and determine such question, and for that purpose to examine such parties, or any of them, and their witnesses, upon oath, and the costs of every such inquiry shall be in the discretion of such justices, and they shall settle the amount thereof.

It is conceived, that the justices cannot, any more than a jury, or an arbitrator, inquire into the claimant's *right* to compensation; they are merely to award the *amount*, and leave the question of right to be decided when proceedings are taken to enforce their award (p).

Amount only to be decided.

The justices, in estimating the purchase-money or compensation, are required to regard, not only the value of the land to be purchased, but also the damage, if any, which may be sustained by reason of the severing of the lands taken from other lands of the owner (q): (Sect. 63.) And where the time for executing the works has been extended by the Board of Trade, they must also take into consideration any additional damage caused by such extension of time (r).

Damage by severance or extension of time.

(m) A justice who is a shareholder cannot act. *R. v. Hammond*, 9 L. T. 423. Any direct pecuniary interest, however small, in the subject-matter of inquiry, disqualifies a justice from acting judicially, but the mere possibility of bias in favour of one party will not avoid the justice's decision. *R. v. Burn*, 35 L. J., M. C. 157; 7 B. & S. 297; L. R., 1 Q. B. 230; and see *R. v. Manchester, Sheffield and Lincolnshire R. Co.*, 36 L. J., Q. B. 171; *R. v. Meyers*, 31 L. T. 247. The objection on the score of interest may be *waived*, as by parties knowingly submitting themselves to the jurisdiction of an interested justice. *Wakefield Local Board of Health v. West Riding and Grimsby R. Co.*, 35 L. J., M. C. 69; 6 B. & S. 791; L. R., 1 Q. B. 84.

(n) See also 8 & 9 Vict. c. 20, s. 3.

(o) It will be observed that this section

applies only to questions of *disputed compensation*, whereas the corresponding action of the Railways Clauses Act, 8 & 9 Vict. c. 20, s. 142, applies to "any question of compensation, expenses, charges, damages or other matter." Some of the cases above enumerated, over which justices have jurisdiction—for instance, those relating to the apportionment of rents,—do not seem to be cases of disputed compensation, within the meaning of section 24 of the Lands Clauses Act.

(p) See Ch. V., Sect. 2, "General Rules as to Compensation."

(q) But it seems sufficient, unless otherwise required by the parties, to assess one entire sum. See *Bradshaw's Arbitration*, 12 Q. B. 562; 17 L. J., Q. B. 362.

(r) 26 & 27 Vict. c. 92, s. 20, post, vol. II.

1. *By Justices of the Peace.*

The mode of enforcing payment is by obtaining an order.

Order may be quashed if made without jurisdiction.

Claims need not be made within 6 months under 11 & 12 Vict. c. 43.

*Reg. v. Edwards.*

Differences as to accommodation works, &c.

Removal of tree.

The proper mode of enforcing payment of money awarded by justices for compensation under the above powers, is by obtaining an order from the justices for the payment of the money which may be enforced by a distress (s). The decision of the justices is conclusive, provided the matter determined be within their jurisdiction. But although the certiorari is taken away (t), an order may be brought up to be quashed if the justices had no jurisdiction to make it (u).

It was decided by the Court of Appeal (x) that sect. 11 of the statute 11 & 12 Vict. c. 43 (y), whereby a complaint before justices must be made within six months (unless some other time shall have been specially limited) from the time when the matter for such complaint arose, does not apply to orders made by justices for the payment of compensation under the Consolidation Acts.

Two justices are also authorized to determine differences as to the kind or number of accommodation works, and the repairing thereof (z), and as to deviations (a); also to hear objections to the taking of lands (b), and to appoint surveyors in certain cases (c); but their powers in these and similar matters do not properly belong to the subject-matter now under consideration.

The Regulation of Railways Act, 1868 (l), also gives power to two justices to award compensation to the owner of any tree standing near a railway, which such justices may order to be removed.

2. *By Surveyors.*

Absence of party entitled.

2. *Compensation assessed by Surveyors.*

Compensation may be assessed by surveyors in the following cases :—In the case of a purchase from a party under disability (sect. 9), in which case if such party be represented by trustees, the trustees may not appoint one of themselves to act as surveyor, otherwise the sale will be invalid (e). If a party, who has received due notice, fails to appear at the inquiry held before the jury; or, if by reason of absence

(s) See 8 & 9 Vict. c. 20, ss. 8—16, 44, and 140, vol. II.

(t) 5 & 9 Vict. c. 18, s. 145; 8 & 9 Vict. c. 20, s. 156, vol. 2.

(u) See *Reg. v. (Heltaham Commissioners)*, 1 Q. B. 467 (Court interested); *Reg. v. Rose*, 21 L. J., M. C. 130 (Jurisdiction exceeded). As to procedure requiring notice to justices and limiting the time for application to within six months from date of the order sought to be impugned, see Crown Office Rules, 1886, Chitty's Statutes Continuation for 1886, p. 17 and notes thereto.

(x) L. R., 13 Q. B. D. 586; 53 L. J., M. C. 149; 51 L. T. 586—C. A.; over-

ruling *Re Edmundson*, 17 Q. B. 67, which case had been disapproved but distinguished in *Reg. v. Harnay*, 41 L. J., M. C. 97; 31 L. T. 702, a case in which land had been taken.

(y) The Summary Jurisdiction Act, 1848, commonly called Jervis's Act.

(z) 8 & 9 Vict. c. 20, ss. 62, 69, vol. II.

(a) *Ib.* s. 11, vol. II.

(b) *Ib.* s. 36, vol. II.

(c) 8 & 9 Vict. c. 18, s. 9; *ib.* s. 85, vol. II.

(d) 31 & 32 Vict. c. 119, s. 24, vol. II.

(e) *Peters v. Lewis and East Grinstead R. Co.*, L. R., 16 Ch. D. 603.

from the kingdom, he be prevented from treating, or if any party cannot, after diligent inquiry, be found (sect. 58), then two justices are required to nominate an able practical surveyor to determine the purchase-money or compensation to be paid for any lands to be purchased or taken by the company, and the compensation for any permanent injury to such lands; and such surveyor is directed to annex to his valuation a declaration in writing of the correctness thereof (*f*) (Sect. 59.) Every surveyor is required to make a declaration that he will act faithfully and honestly: (Sect. 60.) The nomination and declaration must be annexed to the valuation and preserved therewith by the company, and be open to inspection: (Sect. 61.) And all the expenses incident to every such valuation must be borne by the company: (Sect. 62.) In all cases where the compensation has been thus ascertained by a surveyor, by reason that the party could not be found, or was absent from the kingdom, such party, if dissatisfied, may, before he shall have applied to the Chancery Division of the High Court for the money deposited in the Bank, require the question of compensation to be submitted to arbitration, as in other cases of disputed compensation: (Sects. 64, 65.) If a further sum be awarded, the company are required to pay, or deposit the same, and provisions are made as to the costs incident to the arbitration: (Sects. 66, 67.) And we have seen that where lands are purchased or taken from parties under disability to convey, &c., the compensation (except where it has been assessed by a jury, or by arbitration, or by the valuation of a surveyor appointed by two justices) must be assessed by two able practical surveyors, to be appointed as directed by the act (*g*).

Party under disability.

Surveyors, in estimating the compensation, are required to observe the rule already referred to with regard to the damages sustained by the severance of the lands taken, from other lands of the owner: (Sect. 63.)

Damage by severance.

And, when common or waste lands are taken for the purposes of a railway act, the commoners are required to appoint a committee to negotiate with the company (*h*); but if no such committee be appointed, then two justices are required to appoint a surveyor, who is thereupon authorized to determine the amount of compensation which the commoners are entitled to receive for the extinction of their commonable rights: (Sect. 106.)

Common lands.

Under sect. 85 of the Lands Clauses Consolidation Act, a surveyor may also be appointed, in certain cases, to make a valuation of lands;

(*f*) It does not seem to be necessary that the appointment should contain a description of the lands. *Poynder v. Great Northern R. Co.*, 5 Railw. Cas. 200; see the form, tit. *Forms*.

(*g*) Ante, p. 163. See 8 & 9 Vict. c. 18, s. 9, vol. II.

(*h*) See 8 & 9 Vict. c. 18, s. 99, and following sections, vol. II.

2. *By Surveyors.*

but, as this is merely preliminary to the entry on the lands, it is unnecessary to refer further to this subject in this place.

3. *By Arbitration.*

Arbitration  
clauses in the  
Lands Clauses  
Act.

3. *By Arbitration.*

The provisions whereby parties are enabled to refer their claims for compensation, in respect of injuries done to lands, to arbitration, are contained in a few sections of the Lands Clauses Consolidation Act, which we now proceed to transcribe with little abbreviation.

We have already shown that, by sect. 23, any party claiming compensation, whose claim exceeds 50*l.*, has the option to have the same settled by arbitration, provided he signifies his desire to the company in due time (*i*). Sect. 23 concludes thus:—"but unless the party claiming compensation shall as aforesaid signify his desire to have the question of such compensation settled by arbitration, or if, when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months (*k*) have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided" (*l*).

If award be not  
made in three  
months, the  
case must go  
to a jury.  
Sect. 23.

By sect. 25—

Mode of appoint-  
ing arbitrators.  
Sect. 25.

"When any question of disputed compensation by this or the special act, or any act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator (*m*), to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking (*n*), under the hands of the promoters or any two of them, or of their secretary or clerk (*o*), and on the part of any other party under the

(*i*) See ante, p. 181. This applies to clauses under sect. 68. *Evans v. Lancashire and Yorkshire R. Co.*, 22 L. J., Q. B. 254; 1 K. & B. 764.

(*k*) That is, as regards the umpire, three months from the date of his appointment, and not from the time when the awarding power of the arbitrators comes to an end. *Pullen and Mayor of Liverpool, In re*, 51 L. J., Q. B. 285; 46 L. T. 391.

(*l*) This is merely a power given for the advantage of the parties, enabling either party to obtain a settlement of the compensation by a jury, in case of improper delay in the arbitration, which the parties may renounce, and enlarge the time beyond three months, by consent. *Chesham R. Co. v. Lockhart*, 4 Macq. 811; *Palmer v. Metropolitan R. Co.*, 31 L. J., Q. B. 259.

(*m*) If either party objects to the arbitrator appointed by the other side, on the ground that he is not an impartial person, it is not sufficient to protest against the

propriety of the appointment, but it seems that it is the duty of the objecting party to retire from the arbitration. Thus, where the objection was, that a railway company had appointed as their arbitrator a surveyor who had been employed by them in the first instance, to negotiate for the purchase of the land, the value of which was in dispute, Knight Bruce, V.-C., said—that the surveyor ought not to have been selected, but that the claimants had waived the objection, by going on with the arbitration, although under protest. *In re Elliott*, 2 De G. & Sm. 17.

(*n*) By the corresponding clause in the Railways Clauses Act, 8 & 9 Vict. c. 20, s. 12*b*, the appointment of an arbitrator on the part of the company may be made "under the hand of the secretary or any two of the directors of the company."

(*o*) Where a claimant agrees with a railway company to refer a question of compensation, and the agreement is signed on behalf of the company by their secre-

hand of such party, or if such party be a corporation aggregate, under the common seal of such corporation; and such appointment shall be delivered to the arbitrator; and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party, to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute (*p*), and in such case the award or determination of such single arbitrator shall be final."

Where the amount claimed for compensation is not paid or agreed to be paid within twenty-one days, as provided by sect. 68, it is the duty of the claimant, before nominating an arbitrator on his behalf, to attempt to procure the appointment of a single arbitrator (*q*).

*Yates v. Mayor of Blackburn.*

Although the claimant may have no title to compensation, his proceedings to arbitration cannot be restrained by injunction (*r*), and his want of title cannot be set up by a company till he brings an action upon an award in his favour, or till the award is brought up on certiorari; nor will an injunction be granted to restrain a person from using the name of a claimant without authority (*s*); but an arbitrator may be restrained on the ground of corruption (*t*) or misconduct, such as having become indebted to one party without the knowledge of the other (*u*).

Proceedings cannot be restrained by injunction, for no title to compensation.

Misconduct of arbitrator.

It will be observed that sect. 25 requires that each party, on the request of the other party, shall "nominate and appoint" an arbitrator. It is, therefore, important to ascertain what is a valid nomination and appointment of an arbitrator, within the meaning of this and other sections in the Act. It seems that no such nomination and appointment can be said to be made until the appointment is actually made and delivered to the arbitrator (*v*), and notice of such nomination and appointment given to the other side.

What is a valid nomination and appointment.

And there should be, not only an actual appointment and a notification of such appointment to the other side, but the notice of the

Notice of appointment.

tary, it cannot be objected that the signature of the secretary does not bind the company; because s. 25, which authorizes the company to refer by a submission signed by the secretary, applies to all cases of arbitration, whether compulsory or otherwise. *Cullins v. South Staffordshire R. Co.*, 21 L. J., Ex. 217; 7 Exch. 5.

(*p*) The arbitrator can award nothing but money, and not rights of way or approaches. *Re Warr*, 9 Exch. 395; *Re Hylke*, 11 Exch. 401; *Re Duke of Devonport*, 29 L. J., C. P. 241.

(*q*) *Yates v. Mayor of Blackburn*, 29 L. J., Ex. 417.

(*r*) *North London R. Co. v. H. N. R. Co.*, L. R., 11 Q. B. D. 30—C. A.; *London and Blackwall R. Co. v. Cross*, L. R., 31 Q. B. D. 351; 35 L. J., Q. B. 313; 51 L. T. 309; 31 W. R. 201—C. A., reversing Chitty, J.

(*s*) *London and Blackwall R. Co. v. Cross*, supra.

(*t*) *Malmesbury R. Co. v. Budd*, L. R. 2 Q. B. D. 113.

(*u*) *Isidore v. Bédout*, L. R. 9 Q. B. D. 89; approved, with *Budd's case*, by Brett, L.J., in the *North London case*, supra.

(*v*) Supra, note (*q*).



3. *By Arbitration*

appointment must be express in its terms. Thus, where the notice sent by a claimant to a railway company was, "Take notice, that it is *my intention* to nominate and appoint S. M. as my arbitrator," it was held to be insufficient, although the claimant proceeded to say in the notice, that if the company failed to nominate an arbitrator, "I, the said T. B. (the claimant), will appoint the said S. M. to act on behalf of both parties" (*w*).

Before an arbitrator can act on behalf of both parties upon the appointment of the claimant, it seems that there must be two appointments. The claimant should appoint an arbitrator on his behalf, and then, after notification of such appointment and request in writing, if the other party fails for the space of fourteen days to appoint an arbitrator on his behalf, the claimant may appoint one to act for both. The ground for requiring an actual appointment of an arbitrator by the claimant is, that the other party may consider whether he will acquiesce in that appointment (*v*).

Vacancy of  
arbitrator to  
be supplied.  
L. C. Act, s. 26.

The statute then enacts, that if, before the matters referred be determined, any arbitrator die or become incapable, the party by whom he was appointed may nominate some other person in his place, and if for seven days after notice in writing from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed *ex parte*: (8 & 9 Vict. c. 18, s. 26.)

Appointment  
of umpire.  
Sect. 27.

Where more than one arbitrator is appointed, the arbitrators must nominate an umpire (*r*), and if the umpire die, or become incapable to act, they must forthwith, after such death or incapacity, appoint another umpire in his place. The decision of every umpire is final: (Sect. 27.)

Board of Trade  
to appoint an  
umpire.  
Sect. 28.

If the arbitrators refuse, or for seven days after request of either party to the arbitration neglect to appoint an umpire, the Board of Trade (*y*), "shall, on the application of either party to such arbitration, appoint an umpire." The decision of such umpire is final: (Sect. 28.)

(*w*) *Bradley v. L. and N. W. R. Co.*, 20 L. J., Ex. 3; 5 Exch. 769; 1 L. M. & P. 597.

(*v*) 5 Exch. 773.

(*r*) The umpire should be a perfectly disinterested person. Where the arbitrators appointed as umpire a surveyor who had been employed professionally by a railway company, in which he was also a shareholder, whose interests were intimately connected with the company disputing the compensation, which was the subject of the reference, Knight Bruce, V.-C., said—"I am not clear that he ought to have been appointed an umpire, in point of delicacy. I should, however, be going too far to set aside the award on

this ground. There are some things in this case which it would have been better had they been otherwise, but I think that there are no judicial grounds on which to set aside the award. It is saved very narrowly, in my judgment." *Re Elliott*, 2 De G. & S. 17; 12 Jnr. 446.

(*y*) The appointment of an umpire under this section, "if purporting to be signed by some secretary or assistant secretary of, or by some officer appointed for the purpose by, the Board of Trade," is *prima facie* authentic. See 31 & 32 Vict. c. 119, ss. 39, 47, vol. II. The amendment of the section by the Lands Clauses (Umpire) Act, 1853, 46 Vict. c. 15, does not affect railway companies.

If a single arbitrator die or become incapable to act, the matters referred to him "shall be determined by arbitration in the same manner as if such arbitrator had not been appointed:" (Sect. 29.)

Death of single arbitrator.

If either of two arbitrators refuse, or for 7 days neglect to act, the other arbitrator may proceed *ex parte*, and his decision is as effectual as if he had been the single arbitrator appointed by both parties: (Sect. 30.) For this section to operate, it is not necessary that an umpire should have been appointed under sections 27 or 28 (c).

Refusal or neglect to act.

"If, where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within 21 days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid (a):" (Sect. 31.)

If no award be made in 21 days, the umpire to act.

The arbitrators or umpire may call for the production of any documents in the possession or power of either party, as they may think necessary, and may examine parties or witnesses on oath: (Sect. 32.)

Powers as to evidence.

Before any arbitrator or umpire shall enter into the consideration of any matters referred to him, he must in the presence of a justice make a declaration (b) that he will act faithfully and honestly, which declaration is annexed to the award when made, and wilfully acting contrary thereto is a misdemeanor: (Sect. 33.)

Declaration of arbitrators and umpires.

The arbitrators "shall deliver their award in writing to the company" (c), and the company must "forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration," and must at all times, on demand, produce the said award,

Award to be delivered to the company.

(c) *Shepherd v. Corporation of Norwich*, L. R., 30 Ch. D. 553; 51 L. J., Ch. 1050; 53 L. T. 251; 33 W. R. 811.

(a) See the cases on this section, post, p. 263.

(b) This declaration need not be made before a justice of the county in which the lands, the subject of the compensation, lie. *Jarvis v. Staffordshire R. Co.*, 21 L. J., M. C. 52; 2 L. M. & P. 599. Where an umpire, appointed on the 17th May, made the declaration on the 27th May, before he entered on the matters referred, it was held to be sufficient. *Bradshaw's Arbitration*, 12 Q. B. 562; 17 L. J., Q. B. 362. And where an umpire omitted altogether to make the declaration, and after the expiration of three months, he discovered his error, and the attorneys of both sides signed a consent to go on and take no objection, Mellor, J., refused to set aside the award. *Palmer v. Metropolitan R. Co.*, 31 L. J., Q. B. 259.

(c) This section imposes upon the company the direct duty of taking up the award, and therefore it is not a good return to a mandamus, which required the company to take up an award, to say that the umpire refused to give it up without being first paid his fees. The court said that the statute was not meant to take away the arbitrators' or umpire's right of lien at common law. *R. v. South Western R. Co.*, 15 Q. B. 1013; 20 L. J., Q. B. 145. Where an award was made *ex parte*, a mandamus was granted to compel the company to take up the award, although the affidavits did not show that the lands had been injuriously affected, and the claimant had not stated in his notice, given under sect. 23 of the act, what was the extent of his interest, and had also required payment of the sum demanded within 7 days, instead of 21 days as provided by sect. 68. *R. v. Sutton Harbour Commissioners*, 2 W. R. 10.

## 3. By Arbitration

Submission may be made a rule of court.

Award not to be set aside for form.

Severance damage.

(Other cases where the arbitration clauses are applicable.

Award put, sect. 66.

and allow the same to be inspected or examined by such party, or any person appointed by him for that purpose : " (Sect. 35.)

The submission to arbitration may be made a rule of court (*d*), upon the application of either of the parties : (Sect. 36.)

No award can be set aside for irregularity or error in matter of form (*e*) : (Sect. 37.)

Arbitrators cannot, any more than a jury, go into questions of title ; their function is only to assess the value of the interest claimed (*f*).

Arbitrators are required to regard not only the value of the land to be purchased, but also the damage to be sustained, by reason of severing them from other lands of the owner (*g*) : (Sect. 63.)

There are also cases where the exclusive jurisdiction to decide on disputed compensation is vested in arbitrators. Thus, in all cases where the compensation has been ascertained by a surveyor, by reason that the party could not be found, or was absent from the kingdom, such party, is dissatisfied, may, before he shall have applied to the Chancery Division of the High Court for the money deposited in the Bank, require the question of compensation to be submitted to arbitration, as in other cases of disputed compensation (sects. 64, 65) ; and if a further sum be awarded, the company are required to pay the same : (Sect. 66.) In such cases, all the costs incident to the arbitra-

(*d*) See *In re Harper and Great Eastern R. Co.*, L. R., 20 Eq. 39 ; 41 L. J., Ch. 507. It is not necessary to make the award or the appointment of the umpire a rule of court. *Re Bradshaw's Arbitration*, 12 Q. B. 602. In that case the rule directed that "the two several appointments of arbitrators, or submission to arbitration, executed by the parties respectively, should be respectively entered and made a rule of this court," and this was held sufficient. Where claimants who had made an appointment of an arbitrator under sect. 25, refused to produce it, for the purpose of enabling the registrar to draw up an order which had been obtained by the company, making the submission a rule of court, the court refused a motion on behalf of the company, that the order might be drawn up, or that the landowners might produce the appointment ; but this being in the affidavits of the landowners, in opposition to the motion, a statement that their arbitrator had been duly appointed, and also a recital to the same effect in an appointment of an umpire, the court, on a subsequent motion, ordered the submission to be made a rule of court. *Hatch v. North Staffordshire R. Co.*, 2 L. Q. & Sin. 33.

(*e*) Where an umpire stated in his award that he had heard and considered

"the evidence produced by the said company and the said J. S.," and it appeared that the company had not tendered any evidence before the umpire, Lord (ottenham, C., said—"There may be an irregularity, or at least an inaccuracy of expression, in this, but under the act of Parliament there is an express provision that no award is to be set aside for any irregularity in matter of form ; it cannot be carried beyond that ; there is nothing in substance in it ; it does not occasion any mischief at all, whether the word 'and' or the word 'or' is used ; nobody is injured by it, and it is a mere inaccuracy in the use of a term often convertible." *Skirrell v. North Staffordshire R. Co.*, 5 Railw. Cas. 178. All applications to set aside an award must be made before the end of the sittings next after the publishing of the award.

(*f*) *Braddon v. Braddon*, 34 L. J., Ch. 333. See post, p. 277.

(*g*) But, unless otherwise required by the parties, the award may be given for one entire sum, without distinguishing the sum awarded for the price of the land, and the sum allowed for severance. *Bradshaw's Arbitration*, 12 Q. B. 572 ; 17 L. J., Q. B. 302 ; *Re Duke of Devonport and Swansea Harbour Trustees*, 20 L. J., C. P. 211.

tion are borne by the company; but if no further sum be awarded, such costs are in the discretion of the arbitrators: (Sect. 67.) And if persons are entitled to a right of pre-emption of superfluous land, and no agreement can be made between such persons and the company as to the price, then the price must be ascertained by arbitration; and the costs of the arbitration in such cases are in the discretion of the arbitrators: (Sect. 130.)

Superfluous  
lands.

So, in all cases where the company are required, from time to time, to make compensation to the owners of mines lying on both sides of a railway, for all such losses and expenses as are particularly mentioned in the statute, any dispute as to the amount of compensation in respect of such losses and expenses must be settled by arbitration.

Compensation to  
mine owners,  
R. C. Act, s. 81.

It belongs rather to a treatise on the Law of Arbitration to discuss, in any detail, the numerous questions which may arise on the subject now under consideration, and we therefore content ourselves with making a few remarks on some leading points, which relate to the construction of the foregoing arbitration clauses in the Consolidation Acts.

But, first, it may be observed, that it is clear that when a claimant says he is damaged, and therefore entitled to compensation, but the railway company contend that there is no damage, and therefore no compensation, this is a dispute as to the amount of compensation to be settled by arbitration. If the arbitrator finds the damage nominal, or infinitesimally small, he may find that the amount of compensation is nil (*h*). And if upon a reference to an arbitrator as to the price to be paid for land and severance damage, his award is silent as to severance damage, it is nevertheless good (*i*).

Nil may be  
awarded.

With respect to the time within which the award should be made:—

It appears, by sect. 31, that the arbitrators must make their award within twenty-one days after the appointment of the last arbitrator, or within such extended time as shall have been appointed for that purpose. But the arbitrators cannot enlarge the time beyond three months in the whole, because sect. 23 requires the award to be made within that period. And no action lies upon an award made after the three months (*k*). The umpire may, however, be appointed at any period within the above-named three months, although the arbitrators have failed to make their award at the expiration of the

Within what  
time an award  
should be made.  
L. C. Act, s. 31.

(*h*) *Braddy v. Southampton Local Board of Health*, 4 E. & B. 1614. See post, p. 278.

(*i*) *Duke of Beaufort v. Swansea Harbour Trustees*, 29 L. J., C. P. 241.

(*k*) *Kranz v. Lancashire and Yorkshire R. Co.*, 1 E. & B. 751. An award, however, made after three months by consent will not be set aside. *Palmer v. Metropolitan R. Co.*, 31 L. J., Q. B. 259.

*In re* *Bradshaw* (1) is a leading case on this subject. There the company appointed their arbitrator on 23rd March, and the claimant his on 6th April. These arbitrators did not appoint an umpire, or enter on the matters referred; and both parties, before 29th April, joined in applying to the Board of Trade to appoint an umpire. On 29th April the claimant objected to the appointment of any umpire, not a barrister. The company afterwards made a request to the arbitrators; and, after seven days, another application to the Board of Trade, who on 17th May, appointed a surveyor to be umpire. He made his declaration on 27th May, and his award on 26th July. Upon these facts the objections were, that the appointment of an umpire must be completed within twenty-one days, and the award of the umpire be made within three months after the appointment of the arbitrators; that their appointment was complete on 6th April, and that consequently, the appointment of the umpire on 17th May, and the making of the award on 26th July, were too late. But Lord Denman, C.J., said,—

“The powers given for arbitration continue for three months after the arbitrators are appointed, and are determined then only by sect. 23, enacting that the question shall be settled by a jury if, when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made. Then the 31st section, providing that the umpire shall determine, where neither of the arbitrators refuses or neglects to act, and they fail for twenty-one days from their appointment to make their award, operates only to take from the arbitrators the power of making an award, and to vest that power in the umpire, but not to render void the submission to arbitration, and the other powers incidental thereto, such as the appointment of an umpire. The statute contemplates three cases where a single arbitrator is to award, and in each of those cases he has three months for the purpose; viz., where a single arbitrator is originally appointed under sect. 23, or a vacancy is left unsupplied under sect. 26, or one of the two refuses or neglects to act under sect. 30. It is to be observed, that the umpire cannot be brought into action in either of these cases. Then sect. 31 provides for two arbitrators acting and failing to award. If they so fail for twenty-one days, and do not extend their time, the power to award is taken from them, and vested in such umpire as is duly appointed under the other provisions of the statute, which are not affected by this section. The incapacity to make an award has no effect upon the power given to the arbitrators under sect. 27, and to the Board of Trade, on their default, under sect. 28, to appoint a new umpire, in case of the death or failure of the first. And we see no reason why the same incapacity to award should have any effect upon the powers given for appointing the original umpire. If the construction contended for by the claimant is correct, it might happen that at the end of twenty-one days the power to award might cease, and the power to resort to a jury still be

(1) 12 Q. B. 562; 17 L. J., Q. B. 362; Q. B. 115; S. C. in Ex. Ch., nom. *Holdsworth v. Bursham* 31 L. J., *Holdsworth v. Wilson*, 32 L. J., Q. B. 289.

suspended for the residue of three months, which would be a delay without purpose. On these grounds we have come to the conclusion that the appointment of the umpire was valid."

It is also important to notice, that in cases where an umpire has been appointed, the three months allowed him for making the award are to be calculated from the period when the duty of making the award first devolved upon him (*m*). This was decided by Lord Cottenham, C., who said that, under sect. 31, the arbitrators have twenty-one days, in the first instance, to make their award, or they may enlarge the time for themselves; not, however, beyond the three months mentioned in sect. 23; and whenever it happened either at the expiration of the twenty-one days, or the expiration of the enlarged time, that the duty of the umpire commenced, then the umpire had three months allowed him to perform his duty. And in *Bradshaw's case* (*n*), Lord Denman, C.J., adopting Lord Cottenham's decision, said,—

The umpire has three months to make his award.

"The remaining objection is, that the award of the umpire is too late, there being more than three months between the appointment of the arbitrators and his award. But we find it decided, in *Skerratt v. North Staffordshire R. Co.*, that the three months for the umpire commences from the duty devolving upon him. In this decision we fully concur; as this award of the umpire was made within three months from the duty devolving upon him, and indeed within three months from his appointment, it is not too late."

Where by consent the time is enlarged beyond the three months the Court will not set aside the award (*o*). The arbitration clauses being introduced for the benefit of the parties, they are at liberty to renounce at their pleasure the advantages which those clauses afford (*p*). The provisions of the Common Law Procedure Act, 1854, as to enlargement of time, apply to references under the Lands Clauses Act. But the jurisdiction of the Court will not be exercised in favour of a company so as to deprive a landowner of a trial by jury, unless the company apply promptly for an enlargement. In a case before the Lords Justices (*q*) an award was set aside, and the matter referred back to the umpire. After a delay of seven months, during which no proceeding was taken under the reference, the Court refused to exercise the jurisdiction.

Enlargement of time.

(*m*) *Skerratt v. North Staffordshire R. Co.*, 2 Phil. 475; 5 Railw. Cas. 177; 17 L. J., Ch. 161; *Bradshaw's Arbitration*, ante, p. 260. The three months run from the date of the appointment of the umpire, not from the time when the awarding power of the arbitrators came to an end. *Pullen and the Corporation of Liverpool, in re*, 51 L. J. Q. B. 285; 46 L. T. 391.

(*n*) *Ubi supra*.  
(*o*) *Palmer v. Metropolitan R. Co.*, 31 L. J., Q. B. 259.

(*p*) *Calcuttan R. Co. v. Lockhart*, 3 Macq. 808, and *Tyerman v. Smith*, 6 E. & B. 710.

(*q*) *In re Dare Valley R. Co.*, L. R., 4 Ch. 554; 20 L. T. 717.

3. *Re Arbitration*  
 ———  
 If the arbitration  
 fails, and, if the  
 claimant  
 does not com-  
 mence proceedings  
 de novo.

Where arbitrators had been regularly appointed to decide a claim for purchase-money and compensation, but they made no award, and the Board of Trade refused to appoint an umpire, because more than three months had elapsed since the appointment of the arbitrators, Wightman, J., decided the claimant was not bound to begin de novo, under sect. 68, but that the case fell under sect. 23, and that on the refusal of the company to submit the question of compensation to a jury, the claimant was entitled to a mandamus to compel the company to issue a warrant to the sheriff (?).

Costs.  
 L. C. Act, s. 34.

The costs of arbitrations are provided for by sect. 34 of the Act of 1845, and their taxation (if either party requires taxation) by the Act of 1869, 32 & 33 Vict. c. 18. The 34th section of the Act of 1845 is as follows:—

“All the costs of any such arbitration and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions.”

Claimant enti-  
 tled to costs, if  
 no sum offered.

It seems that under sect. 34, if the company do not make any offer at all, and there is a compulsory arbitration under the statute, the claimant is entitled to costs (s). In a case in which a claimant, the amount claimed under sect. 68 not being paid within 21 days, without attempting to procure the appointment of a single arbitrator, immediately nominated an arbitrator on his behalf, but omitted to deliver the nomination to such arbitrator, and the promoters subsequently and before nominating their arbitrators tendered a sum for damages and costs, which was refused, and exceeded the amount afterwards awarded: it was held that the claimant was not entitled to the costs of the arbitration, but the Court declined to lay down any rule as to the time within which a tender must be made (t). It has been also held, however, that a second offer made after the appointment of the arbitrators was too late, and the rule was laid down that the offer must be made before the arbitrators are appointed, that is, before any costs can be incurred (u).

Offer must be  
 made before  
 arbitration  
 begins.

Amended offer.

The company are not bound by their first offer, but may make an amended one. And this rule holds good whether the first offer was made with a view to an inquiry before a jury or not. If, therefore, an arbitrator award a less sum than that named in an amended offer, made in time, the claimant is not entitled to costs. Such is the effect

(r) *Re South Yorkshire and Goole R. Co.*, 18 L. J., Q. B. 333; 14 Jur. 1093.

(s) *Martin v. Leicester Waterworks Co.*, 27 L. J., Ex. 132.

(t) *Yates v. Mayor of Blackburn*, 29

L. J., Ex. 117.

(u) *Gray v. North Eastern R. Co.*, L. R., 1 Q. B. D. 696; 24 W. R. 769; 34 L. T. 757. And see per Mellor, J., in *Lord Fitzhardinge's case*, *infra*.

of *Earl Fitzhardinge v. Gloucester and Berkeley Canal Co. (x)*, in which also it was held that the master is not bound to tax costs unless the claimant be entitled to them.

Where a landowner claimed compensation, first, in respect of the value of his land; and secondly, in respect of damage done to other lands held therewith, and the matter was referred to an arbitrator, under sect. 23, and the company made no previous offer of any sum in respect of either claim, and the arbitrator awarded a sum of money for the value of the land, but found that the claimant had no claim to compensation in respect of the damage to his other lands, it was contended that the claimant was entitled, under the 34th section, to all the costs of and incident to the arbitration, just as if one claim only had been made and allowed; but the Court of Queen's Bench decided that the arbitrator was not bound to allow the claimant the whole of his costs, but that he might leave each party to bear his own costs incident to the claim which was disallowed. The Court was also of opinion that if a single claim was made and wholly disallowed, the claimant would not be entitled to any costs, although the company should not have made any previous offer in respect of the alleged damage (y).

Where the costs are divisible.  
*R. v. Drom.*

If parties by a deed or other instrument agree to refer a case of compensation to arbitration, without referring to the provisions of the Consolidation Acts as to costs, and the agreement to refer is also silent on that subject, the claimant is not entitled to any costs, although the award may be of a larger sum than the company had previously offered as compensation (z).

Where the power to give costs should be expressly given.

In a case in which a statute directed that in certain cases a party who succeeded in obtaining compensation before a jury should be entitled to recover the costs and expenses of the notice and precept, and of summoning and returning the jury and witnesses, and also of the inquest; it was held, that this included charges for the attorneys attendance, and for briefs, witnesses, and the like, but not the expenses incurred by surveyors in valuing the premises; if witnesses, surveyors would be on the same footing as others (a). But where in a similar case the statute directed that a party should be entitled to receive all the costs of summoning such jury, and the expenses of

What costs allowed.  
*P. v. Justices of York.*

(x) 1 L. R., 7 Q. B. 776; 41 L. J., Q. B., 316; 27 L. T. 196; 20 W. R. 800. In this case a mandamus went to the master to tax the costs, on the terms that the claimant would undertake to pay the costs of taxation, in order that the question might be raised in error, if the claimant chose. But it is believed that the claimant did not avail himself of this permission.

See 41 L. J., Q. B. 322, n.

(y) *R. v. Drom*, 17 Q. B. 969. See the cases as to costs, *infra*.

(z) *Ex parte Rynd*, 16 L. J., Q. B. 301. See *Martin v. Leister Widdowes & Co.*, 27 L. J., Ex. 432; *Evles v. Mayor of Blackburn*, 30 L. J., Ex. 358.

(a) *R. v. Justices of York*, 1 A. & E. 828.



3. *By Arbitration*

Whether award  
should find  
amount of costs.

Costs may be  
given after the  
three months.

The umpire has  
jurisdiction over  
costs.

Costs in arbit-  
ration under  
special act.

Taxation of  
costs.  
L. C. Act, 1869.

witnesses, it was held, that the party was not entitled to the general costs of the inquiry (b).

A question was formerly raised whether, under sect. 34, the arbitrator or umpire ought to find and state in his award the amount of costs to be paid, or whether a supplementary certificate or award might be subsequently made. The decisions were not uniform on this point, but the practice was to give a separate certificate for costs; and as these costs must now be taxed by one of the Masters of the Supreme Court (c), it seems sufficient to refer to the cases in a note (d). The result of them appears to be, that the award need only show the amount of the compensation, and that it need not appear therein whether the claimant is entitled to costs, by reason of the arbitrators having awarded a larger sum than the company had previously offered. And further, that the adjudication of costs may be made after the expiration of the period limited for making the award (e). It has also been ruled that an umpire has power over the costs when he makes the award: and that the word "arbitrators" in sect. 34 includes an umpire (f).

Where a special act incorporating the Lands Clauses Act, except as expressly varied, directed that arbitrations should be conducted by an arbitrator appointed by the Board of Trade, but was silent as to costs, it was held that a successful claimant was entitled to costs by virtue of the Lands Clauses Act, and further, that an action lay for the costs before taxation (g).

It is now provided by the Lands Clauses Act, 1869, 32 & 33 Vict. c. 18 (h), that where by the Act of 1845, or any act incorporating it, "any question of disputed compensation is determined by arbitra-

(b) *R. v. Gardner*, 6 A. & E. 112; *R. v. Sheriff of Warwickshire*, 2 Railw. Cas. 661.

(c) Lands Clauses Act, 1869 (32 & 33 Vict. c. 18); Judicature Act, 1873, s. 77.

(d) *L. and N. W. R. Co. v. Quirk*, 5 D. & L. 685; *Wills, Somerset and Weymouth R. Co. v. Pooks*, 3 Exch. 728. [This case was subsequently compromised.] *Gould v. Staffordshire Potteries Waterworks Co.*, 5 Exch. 214; 19 L. J., Ex. 281; 14 Jur. 528; 6 Railw. Cas. 568; 1 L. M. & P., 264.

(e) See *Martin v. Leicester Waterworks Co.*, 27 L. J., Ex. 432, where an arbitrator, appointed by an agreement which incorporated sect. 34, having awarded compensation, afterwards, by a separate writing, settled the costs, and the claimant recovered them in an action. See also *Collins v. South Staffordshire R. Co.*, 7 Exch. 5; *Yates v. Mayor of Blackburn*, 29 L. J., Ex. 417, similar actions. See also *Holdsworth v. Bursham*, 31 L. J.,

Q. B. 145.

(f) *Gould v. Staffordshire Potteries Waterworks Co.*, ante, n. (d). See also *Douca v. Williams*, 3 Exch. 93, where the word arbitrators, in a judge's order, was held to include, by that description, the umpire who had made the award. It is to be observed, that by sect. 31 "the matters" by the statute referred to arbitrators are to be determined by the umpire, which seems clearly to show that he has power over the costs.

(g) *Metropolitan District R. Co.*, apprs., *Sharpe*, resp., L. R., 5 App. Cas. 425; affirming decisions below, L. R., 4 Q. B. D. 615.

(h) Repealing sect. 33 of the Regulation of Railways Act, which provided in similar terms for taxation by a Master of the Queen's Bench. Sect. 37 of the Railway Companies Act, 1867, 30 & 31 Vict. c. 127, in pari materia, but relating to lands only, is repealed by the Statute Law Revision Act, 1875, 38 & 39 Vict. c. 66.

tion" the costs must, "if either party so requires," be taxed by a Master. This statute, which can be "contracted out of" (i) applies only to arbitrations under the Lands Clauses Act *simpliciter*, and not to arbitrations embracing matters which could not, except by agreement, be referred under that act (j). Under the Judicature Acts, the taxation will be by a Master of the Supreme Court. The Court has no jurisdiction to review the Master's taxation (k).

The best, if not the only, way of recovering the costs of an arbitration is by action (l). A vendor has no lien upon the land for such costs (m). The costs are payable within a reasonable time after award, and execution by the landowner of a conveyance of the land to the company is not a condition precedent to payment (n).

The manner of costs.

It may be observed, generally, that arbitrators have the most extensive discretion as to the mode of conducting the inquiry before them (o); and as laymen are frequently selected to be arbitrators and umpires, there cannot be any doubt that they are entitled to avail themselves of professional assistance in conducting the inquiry and preparing the award (p). The evidence should always be taken in the presence of the parties or their agents (q); but it seems that an umpire may communicate privately with the arbitrators (r).

The manner in which an arbitration should be conducted.

Where one of two arbitrators was absent at a meeting, and, notwithstanding a protest from the parties who had appointed him, the other arbitrator, together with the umpire, whose powers to act had not at that time arisen, heard evidence, and the umpire subsequently made his award, after his power to act had arisen, but without giving any notice to the parties who had protested, the award was set aside as invalid (s). But where the arbitrators and the umpire were all present from the commencement of the proceedings, and heard all the evidence, while sitting together, and the umpire afterwards, on the disagreement of the arbitrators, made his award without further

(i) See *Wombwell v. Barnsley Corporation*, 36 L. T. 708.

(j) *Doullon v. Metropolitan Board*, L. R., 5 Q. B. 333; 39 L. J., Q. B. 166.

(k) *Sandbeck Charity Trustees v. North Staffordshire R. Co.*, L. R., 3 Q. B. 11. 1; 47 L. J., Q. B. 10; 37 L. T. 391; 26 W. R. 229—C. A., approving *Owen v. L. and N. W. R. Co.*, L. R., 3 Q. B. 54; 37 L. J., Q. B. 35.

(l) See n. (c), *supra*.

(m) *Ferrers (Lord) v. Stafford and Uttoxeter R. Co.*, L. R., 13 Eq. 521.

(n) *Cupell v. G. W. R. Co.*, L. R., 11 Q. B. D. 345; 52 L. J., Q. B. 315; 48 L. T. 505; 31 W. R. 555—C. A., affirming 9 Q. B. D. 459.

(o) *Tilman v. Copp*, 5 C. B. 211.

(p) *Threlfall v. Fanshawe*, 10 L. J., Q. B. 334; 1 L. M. & P. 310. The

doubts thrown on this case in *Parkinson v. Smith*, 30 L. J., Q. B. 178, do not apply to the point for which it is here cited, though its authority as a decision is shaken. See on the power of an arbitrator to call in experts, men of science or valuers, *Caledonian R. Co. v. Lockhart*, 3 Macq. 808. In *re Underwood and Bedford and Cambridge R. Co.*, 11 C. B., N. S. 442, it was held to be improper to employ the attorney of one of the parties to assist in drawing the award.

(q) *R. v. Johnson*, 6 Q. B. 637; *Re Pless*, 6 Q. B. 845.

(r) *Skerratt v. North Staffordshire R. Co.*, 5 Railw. Cas. 177.

(s) Cor. Knight Bruce, V.-C., affirmed on appeal by Lord Cottenham, C. *Ex parte Hineley*, 5 Railw. Cas. 383; 2 De G. & S. 33; 12 Jur. 389.

3. *By Arbitration*

When awards  
are not set aside  
upon motion.

communication with the parties, Knight Bruce, V.-C., decided that the award could not be set aside on the ground that the umpire joined in the inquiry before the time for his acting had arrived (*t*). Unless an award is shown to be clearly defective and illegal, the Courts of Law will not set it aside upon motion, but will leave the parties to their ordinary remedy; and if the party objecting to the award is a landowner, whose lands the company have taken, he may raise the question of illegality by bringing an action of trespass or ejectment (*u*).

When awards  
are conclusive  
and cannot be  
impeached.

In another part of this work (*v*) a remark is made on the apparent injustice of permitting all verdicts found by juries summoned under the Consolidation Act to be conclusive, whilst errors in fact or in law, committed at Nisi Prius, are frequently re-argued and corrected in our Courts. The same remark is applicable to awards made under the Consolidation Acts. Numerous instances have occurred in which parties aggrieved have endeavoured in vain to obtain redress by applying to the Courts. Mistakes made by the arbitrator on matters of law do not generally invalidate an award (*x*): and, even where the decision of the arbitrator has been contrary to the evidence, there is no sufficient ground afforded for setting aside the award (*y*), unless collusion, or, in other words, fraud, is proved. The reason why awards cannot be impeached for errors in fact or errors in law, not apparent on the face of the award, seems to be founded on the principle that arbitrators are judges of the parties' own choosing (*z*). A distinction on this point seems, however, to exist in the case of awards made under the Consolidation Acts, because, as we have seen, if either of the arbitrators refuse to concur in the appointment of an umpire, the Board of Trade are empowered to appoint him, without any previous communication with either of the contending parties. There is, however, one remedy which may be available in some instances. If it is found that the arbitrators or umpire are entertaining a question which they ought not to entertain, an application may be made to the Court or a judge to revoke the submission (*a*)—for although the Lands Clauses Act, s. 25, enacts that

(*t*) *In re Lifford*, 2 De G. & S. 17; 12 Jur. 415.

(*u*) *North Staffordshire R. Co. v London*, 2 Exch. 235; *Sutton v. Wood*, 2 Exch. 241; *Widley, Somerset and Weymouth R. Co. v. Cook*, 3 Exch. 725; *N. C. in Chambers*, 2 Macn. & G. 357. See also 1 R. & B. 1015.

(*v*) Post, sect. I.

(*w*) *In Hodgkinson v. Tarnu*, 27 L. J., C. P. 66; Cockburn, C. J., said—"It is not easy to reconcile all the cases as to how far the Court will interfere where the arbitrator has made an error either as to

the law or the facts of the case, but the current of modern authorities is to the effect, that, unless it appears upon the face of the award that the arbitrator has proceeded upon some ground which will not in point of law support his decision, the Court will not interfere."

(*y*) *Beardshaw's Arbitration*, 12 Q. B. 562; 17 L. J., Q. B. 362.

(*z*) 1 Bae. Abr., tit. Arbitrament, D.; *Fidler v. Flarick*, 3 C. B. 705.

(*a*) *Furnell v. Eastern Counties R. Co.*, 2 Exch. 341; 17 L. J., Ex. 223, 297. See *Hodgkinson v. Tarnu*, 27 L. J., C. P. 66.

neither party shall have power to revoke the submission, without the consent of the other, the Court or a judge would still have the power to interfere, if it appeared that arbitrators or an umpire, appointed under the acts, are about to exceed their jurisdiction.

It has been decided by a Court of Appeal that the provisions of the Common Law Procedure Act, 1854, with regard to sending matters back to the arbitrator and enlarging time, apply to references under the Lands Clauses Act (b), and that an arbitrator nominated by the parties under sect. 25 of the Lands Clauses Act, may state a special case under sect. 5 of the Common Law Procedure Act, 1854 (c), for the decision of the High Court, from which decision an appeal lies to the Court of Appeal (cc).

Special case may be stated.

Appeal.

Several instances of invalid awards are mentioned in other parts of this work. Thus, we have seen that an award is bad, if the previous notices are defective, so that the interest of the party in the matters to be adjudicated upon is left in doubt (d), or if the lands valued are different from those which were the subject of the notice to treat (e).

When an award is invalid.

But where a deed of submission was made between L. and a railway company, and after reciting that the company were authorized to take certain lands, that they had given L. notice that they required his lands, and that it was agreed that they should become the purchasers thereof in the mode thereafter pointed out, it was covenanted that it should be referred to an arbitrator to determine the value to be paid for the lands; that the purchase-money should be paid within three days after the making of the award, and "thereupon" L. should execute a conveyance, "subject to the payment of the amount of such purchase-money into the Court of Chancery, under the circumstances and in the manner provided for by the Lands Clauses Consolidation Act." And the arbitrator found the value of the land at a certain sum, and directed it to be paid "within three days after," &c., "subject," &c. (following the words of the submission), and a rule having been obtained, calling upon the company to show cause why they should not pay the sum of money, under 1 & 2 Vict. c. 110, s. 18, Wightman, J., decided—1. That, assuming even that the arbitrator had exceeded his jurisdiction in ordering the money to be paid, the rest of the award was good; and that, as the award ascertained the amount of the purchase-money which the company by their deed of submission had agreed to pay, there was

Award valid.  
*Lindsay v. Great London and Portsmouth R. Co.*

(b) *Re Dacre Valley R. Co.*, L. R., 1 Ch. 554; 34 L. J., Ch. 417.

(c) *Rhodes v. Merdith Drainage Commissioners*, L. R., 1 C. P. D. 102; 35 L. T. 46; reversing the decision below, L. R., 9 C. P. 508; 13 L. J., C. P. 323.

(cc) *Bidd v. North Staffordshire R. Co.*, L. R. 10. B. D. 112; 19 L. J. Q. B. 218; 10 L. T. 801; 27 W. R. 510.—C. A.

(d) *Ante*, p. 179.

(e) *Ante*, pp. 179, 190.

3. By Arbitration sufficient to enable the Court to make an order on them to pay it. 2. That the payment of the money and the execution of the conveyance by L. were not dependent conditions, but that the payment was to precede the conveyance, and that it was, therefore, no answer to the rule that a conveyance had not been tendered. 3. That it was no objection that it was not shown that the company had taken possession of the land (*f*).

*Re Ware.*

By a Canal Act, which incorporated the Lands Clauses Act, the company were authorized to take a field called "Clayfield," held by one W., under a lease from the warden of All Souls, Oxford. Notice to take this field having been given, and the parties being unable to agree as to the terms, an arbitrator was appointed under the act to settle the question of disputed compensation. The company had taken a portion of Clayfield, but had left the rest in the possession of W., without, however, giving him any access to it; but they had delivered to the warden a grant of a right of road to that portion which it was stipulated was to enure for the benefit of W. and his tenants, the way so granted being more commodious than before. The arbitrator awarded to W. a pecuniary compensation in respect of the works of the company and the lands taken by them. An application to set aside the award having been made, on the grounds that the arbitrator had omitted to adjudicate on the right of way to Clayfield, and that he had not awarded damages for prospective damage which might be caused by floods, or apportioned the rent of the leasehold land, or determined in what proportion the rent should remain chargeable:—It was decided that the arbitrator had acted rightly under the Lands Clauses Act in awarding a money compensation only, and that he would have exceeded his powers if he had adjudicated either on the question of the right of way, or of the apportionment of the rent; also that the award was right in not giving compensation for injuries which had not actually arisen (*g*).

If claimant disputes an award, the company may nevertheless withdraw their deposit made under sect. 85.

Where an award was made after the company had entered on the lands under sect. 85, and the claimant disputed the validity of the award, and refused to make a title to the lands, and was prosecuting an action against the company to have the question as to the award determined, and the company, on the refusal of the claimant to send in an abstract of title paid the amount of compensation awarded into the bank, and executed a deed-poll under sects. 76 and 77, and then applied to have a large sum of money restored to them, which they had originally paid into Court in pursuance of sect. 85, and this application was opposed by the claimant, who contended that, as

(*f*) *Lindsay v. Direct London and Portsmouth R. Co.*, 1 L., M. & P. 620.

(*g*) *Re Ware*, 9 Exch. 395; 23 L. J., Ex. 145.

the award was bad, the fund ought to remain in Court until the respective rights of the parties were determined; Lord Cottenham, C., said, that there was not sufficient ground stated to him to induce him to refuse the application; and he ordered the money to be paid to the company (*h*).

Where a claim for purchase-money and compensation was, by agreement between the parties, referred to arbitration, and the owner consented that the company should enter on the land, and an award was made by the arbitrators, but a dispute arose as to its validity, and the claimant thereupon gave the company a notice to quit the lands, and brought an ejectment, it was decided that the action would not lie, for the plaintiff had no right to revoke the consent which he had given, as to the entry on the land, and his remedy was to proceed to enforce the payment of the amount of compensation (*i*).

Claimant's disputing award may not bring ejectment if they consented to the entry on the lands.

An award may be enforced by an action on the award. But where the action is to recover compensation for land compulsorily taken, the execution of a conveyance of the land is a condition precedent to the right to bring it (*k*). Or a more summary remedy may be resorted to under 1 & 2 Vict. c. 110, s. 18, when the submission is made a rule of Court; but it has not been the practice of the Courts to grant applications under that statute, when any reasonable and well-founded doubts were raised as to the validity of the proceedings (*l*). It seems that an attachment will not lie against an incorporated company, like a railway company, for non-performance of an award (*m*).

Mode of enforcing an award.

It is a good return to a mandamus commanding a company to take up an award, that the claimant's land was not "injuriously affected" within the meaning of the Lands Clauses Act (*n*).

It has been held by the House of Lords, that an arbitrator may be called as a witness in a legal proceeding to enforce his award. He may be asked questions as to what passed before him, and what matters were presented to him for consideration, but not as to what passed in his own mind when exercising his discretionary power on the matters submitted to him (*o*).

Evidence by arbitrator.

Special provision as to assessing compensation for land taken in Ireland is made by the Railways Act (Ireland), 1851, 14 & 15 Vict. c. 70. By sect. 3 of that act, the sections (except 16 and 17) of the

IRELAND.  
Appointment of arbitrator by Public Works Commissioners.

(*h*) *Re Fooks*, 2 Macn. & G. 357. See ante, p. 268, n. (*d*).

(*i*) *Doe d. Hudson v. Leeds and Bradford R. Co.*, 20 L. J., Q. B. 486; 15 Jur. 946; 16 Q. B. 796.

(*k*) *East London Union v. Metropolitan R. Co.*, L. R., 4 Ex. 300; 38 L. J., Ex. 225.

(*l*) *Murkenie v. Sligo and Shannon R. Co.*, 9 Q. B. 250; L. and N. W. R. Co. v. *Quick*, 5 D. & L. 685.

(*m*) *Murkenie v. Sligo and Shannon R. Co.*, 9 Q. B. 250; *R. v. Lidgett*, 1 Q. B. 619; but see Bul. N. P. 201; *R. v. Eastern Counties R. Co.*, 10 A. & E. 567.

(*n*) *Reg. v. Chumbrian R. Co.*, L. R., 4 Q. B. 320; 38 L. J., Q. B. 198; 20 L. T. 437; 17 W. R. 667.

(*o*) *Burleigh (Duke of) v. Metropolitan Board*, L. R., 5 H. L. 418; 11 L. J., Ex. 137; 27 L. T. 1.

3. By Arbitration Lands Clauses Act, 1845, "respecting the purchase and taking of lands otherwise than by agreement," are not applicable to Ireland. Compensation is determined by an arbitrator appointed by the Commissioners of Public Works, on the application of the company: (Sects. 4, 5, 9.) The Act of 1851 was amended and made perpetual in 1860 by 23 & 24 Vict. c. 97, and further amended in 1864 by 27 & 28 Vict. c. 71, and in 1868 by 31 & 32 Vict. c. 70. All these acts are printed in vol. II. of this work.

By sect. 14 of the Act of 1851, certificates of the amount awarded by the arbitrator are to be delivered by the company to the person entitled, and by sect. 21 the right to have the certificate may be enforced by application to the Court of Chancery in Ireland. In a case where a valuer made his award after the compulsory powers of the special act had expired, it was held by the House of Lords that the Court had power to grant the petition of the landowner that the company might be ordered to lodge the amount in the Bank of Ireland (*p*).

4. By a Jury.

*4. Compensation assessed by a Jury.*

Steps preliminary to inquiry.

L. C. Act, s. 39.

In all cases where purchase-money or other compensation is to be assessed by the verdict of a jury, the company are required to issue their warrant under their common seal, directed to the sheriff, or, if he be interested (*q*), to the coroner of the county, city, &c. in which the lands, the subject of the compensation, are situate (*r*), whereby they require him to summon a jury to assess the purchase-money and other compensation. It is not necessary to repeat the remarks which have already been made, as to the necessity of proceeding in strict compliance with the directions of the statute, in taking all steps preliminary to the holding of the inquiry. These steps in ordinary cases are, first, a notice from the company to the owners, &c. of the lands, requiring them to treat.\* Secondly, the claim or reply of the owners, given in conformity with the terms of the notice. Thirdly, the notice from the company of their intention to issue a warrant, and a tender of a sum of money for compensation.† Fourthly, the warrant from the company directed to the sheriff (*s*). Fifthly, the notice given by the sheriff to the company, of the time

\* Page 174.

† Page 178.

‡ Page 181.

(*q*) *Cork and Youghal R. Co. v. Harnett*, L. R., 5 H. L. 111.

(*r*) Where a warrant was issued to the

the sheriff was a shareholder. *R. v. L. and N. W. R. Co.*, 9 L. T. 423.

(*s*) If the lands are situate in more than one county, the sheriff of each county has

and place of holding the inquisition (f). Sixthly, a similar notice given by the company to the claimant of compensation (u). And, lastly, the verdict and judgment (v). In addition to these notices, it may in some cases be necessary for a claimant to give notice that he requires the company to take the whole of a house or other building,\* or he may give notice to the company, that he requires a special jury (y).

\* Page 17.

We have also seen that in cases where the claimant demands compensation under sect. 68, he is required to give notice to the company of the amount of his claim, and he has also the option of expressing his desire to have the same assessed by a jury (z), and the company are required, under a heavy penalty, to issue their warrant to the sheriff, and the subsequent proceedings then follow as in ordinary cases.

The following is a summary of the clauses in the Lands Clauses Act relating to the subject now under consideration. We have already seen that, by sect. 38,† the company must give ten days' notice of their intention to summon a jury, and in such notice state what sum they are willing to give for the lands sought to be purchased, and for damage (a). If this offer be not accepted, the company issue their warrant to the sheriff of the county in which the lands are situate (b), requiring him to summon a jury: (Sects. 39, 40.) On receipt of the warrant, the sheriff summons a jury of twenty-four qualified persons, and gives notice to the company (c) of the time and place appointed for the meeting, concerning both of which special provisions are made (sect. 41); and a like notice must be given by the company to the claimant (d): (Sect. 46.) A jurymen cannot be summoned, without his consent, more than once in every year: (Sect. 57.) The sheriff, under-sheriff, or other legal competent deputy (e), presides at the inquiry (f); and the party claiming compensation is to be deemed the plaintiff, and has all such rights and privileges as the plaintiff is entitled to in trials of actions at law (g) (sect. 43); and if the party claiming compensation appears (sect. 47), a jury of twelve persons is drawn in the usual manner: (Sect. 42.)

Inquisition and preliminary proceedings.

L. C. Act, ss. 38-42.

† Page 181.

Party claiming compensation to be deemed plaintiff.

b) 8 & 9 Vict. c. 18, s. 41. See form, vol. II, tit. *Forms*.

c) 8 & 9 Vict. c. 18, s. 46. See form, vol. II, tit. *Forms*.

d) 8 & 9 Vict. c. 18, s. 50. See form, vol. II, tit. *Forms*.

e) 8 & 9 Vict. c. 18, s. 51. See form, vol. II, tit. *Forms*.

f) See form, vol. II, tit. *Forms*.

g) See form, vol. II, tit. *Forms*.

*Forms*.

(d) *Ibid*.

(e) How a deputy should sign, see *Stroud v. Watts*, 3 D. & L. 799; *R. v. Perkins*, 7 Q. B. 165.

(f) See also the Interpretation Clause, tit. *Sheriff*; *R. v. Sheffield R. Co.*, 11 A. & E. 191; 1 Railw. Cas. 537.

(g) As to the plaintiff's right to begin, and whether the sheriff has power to ex-



4. *By a Jury.* Either party may request the sheriff to summon witnesses, or to order a view: (Sect. 43.) The jury and witnesses are sworn: (Sect. 48.) And if they or the sheriff neglect their duties, they are liable to pay certain penalties, and every penalty payable by a sheriff or jurymen is to be applied in satisfaction of the costs of the inquiry, so far as the same will extend: (Sects. 44, 45.) Either party may have a special jury (*h*) (sects. 54, 55); and, by consent, more than one inquiry may be had before the same special jury: (Sect. 56.) If the claimant for compensation fail to appear at the time appointed the inquiry is not to be further proceeded in, but the compensation is to be ascertained by a surveyor appointed by two justices: (Sects. 47, 59.)

Cases on the foregoing sections.

Presiding officer must not be interested.

The foregoing are the statutory provisions which regulate the preliminary proceedings before the sheriff. There are but a few decisions touching this part of our subject. As it is a general rule of law, that no interested person can act as a judge in a judicial proceeding (*i*), it is a fatal error if the sheriff or other presiding judge be interested in the matter (*k*); and the 39th and 40th sections of the act make express provision for the coroner or other person supplying the place of an interested sheriff. But any objection to the competency of the sheriff, or other presiding officer, must, if known (*l*), be taken at the hearing of the inquiry (*m*). Thus, where an inquiry directed to the sheriff was held before an under-sheriff, who was a shareholder in the company, but it appeared that the claimant's attorney was informed of that fact before the inquiry commenced, a certiorari to remove the inquisition was refused, on the ground that, as no objection was made until the verdict had been given, the claimant had waived any right to object (*n*).

If the under-sheriff be interested in the inquiry, as by being a shareholder in the company, the warrant ought nevertheless to be directed to the sheriff, and he may preside in person, or authorize some other disinterested party to preside as his deputy (*o*). A challenge to the array is not given by sects. 54 and 55 (*p*).

(*h*) The sheriff is bound to issue his warrant within twenty-one days, under sect. 68, although claimant may give notice for special jury, under sect. 54. *Glyn v. Aberdare R. Co.*, 28 L. J., C. P. 271. Any objection to the jurymen, on the ground that they are not qualified, must be taken by challenge; want of qualification is not a ground for setting aside the inquisition. *Re Chelsea Waterworks Co.*, 10 Exch. 731. See also *Cooling v. Great Northern R. Co.*, 15 Q. B. 486.

(*i*) *Re v. Cheltenham Paving Commissioners*, 1 Q. B. 467; 10 L. J., M. C. 99.

(*k*) See *Re v. Manchester, Sheffield and*

where the interest of the sheriff was held too remote.

(*l*) Where the interest of the sheriff was not discovered till afterwards, it was held that the claimant had not waived his right to object by attending the proceedings. *Re v. Sheriff of Warwickshire*, 21 L. T., O. S. 211; and see ante, p. 253, *in the*.

(*m*) *Cherrigall v. London and Blackwall R. Co.*, 5 M. & G. at p. 247.

(*n*) *Ex parte Buddley*, 5 D. & L. 575.

(*o*) *Worsley v. South Devon R. Co.*, 16 Q. B. 539; 20 L. J., Q. B. 251.

(*p*) Per Coleridge, J., *Cooling v. Great Northern R. Co.*, 15 Q. B. 496. In the

It may be noticed here that, by some of the railway acts passed in 1864 (*g*), it was provided, that questions of disputed compensation to be assessed by a jury in the City of London should be heard in the Lord Mayor's Court; and a similar provision appears in the Metropolitan Inner Circle Completion Act, 1874, 37 & 38 Vict. c. xcix., s. 48.

Trial in Mayo Court, London

And questions of disputed compensation triable before a jury may now be tried, if a judge so direct, in the same manner as ordinary actions. The application to the judge may be made either by the company or the claimant. Such is the effect of the very important alteration of procedure made by the Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, ss. 41—44. Sect. 41 is as follows:—

Trial before Judge of High Court.

“Whenever in the case of any lands purchased or taken otherwise than by agreement for the purposes of any public railway any question of compensation in respect thereof, or any question of compensation in respect of lands injuriously affected by the execution of the works of any public railway, is under the provisions of the Lands Clauses Consolidation Act, 1845, to be settled by the verdict of a jury (*r*) empanelled and summoned as in that act mentioned, the company or the party entitled to the compensation may, at any time before the issuing by the company (*s*) to the sheriff as by that act directed, apply to a judge of any one of the superior Courts of common law at Westminster, who shall, if he think fit, make an order for trial of the question in one of the superior Courts upon such terms and in such manner as to him shall seem fit; and the question between the parties shall be stated in an issue to be settled in case of difference by the judge or as he shall direct: and such issue may be entered for trial and tried accordingly in the same manner as any issue joined in an ordinary action, at such place as the judge shall direct: and the proceedings in respect of such issues shall be under and subject to the control and jurisdiction of the Court as in ordinary actions therein, but so, nevertheless, that the jury shall, where the issue relates to the value of lands to be purchased and also to compensation claimed for injury done or to be done to lands held therewith, deliver their verdict separately in manner provided by the 49th section of the Lands Clauses Consolidation Act, 1845.”

Either party may apply to a judge, who may direct an issue to try cases of compensation in superior courts.

By sect. 42, the judge's order and notice thereof to the claimant is equivalent to the warrant to the sheriff. By sect. 43, the verdict of the jury is equivalent to a verdict under the Lands Clauses Act. By sect. 44, the interpretation clause of the Lands Clauses Act is made applicable to the preceding sections. The twenty-one days within which by s. 68 of the Lands Clauses Act, 1845, the warrant would have been issued, must not have elapsed before a summons under this section is made returnable (*ss*). The time for appealing in an issue is the same as in an action (*t*).

reorder the sum assessed by a jury, to the effect that a payment had been improperly substituted for another jury in previously void, was disallowed, as being vexatious, it appearing that no such objection had been mentioned in various previous proceedings, taken by the company to set aside the inquiry. See *Re Chelsea Works, &c.*, 10 Exch. 731.

(*g*) The Charing Cross Railway Act, 1864, 27 & 28 Vict. c. cxvii., s. 7; The

(New Lines) Act, 1861, 27 & 28 Vict. c. cxv., s. 50.

(*r*) See sect. 23 of the Lands Clauses Act, by which the claimant has a right to a jury in most cases, if he pleases.

(*s*) See. Semble, the words “of their warrant” are omitted by mistake.

(*t*) *Tanner v. Snelton, &c.*, 11 Co., 45 L. T. 200.

(*u*) *New River Co. v. Midland R. Co.*, 36 L. T. 539.

4. *By a Jury.*

Proceedings at inquisition before sheriff.

Purchase-money and compensation to be assessed separately.

L. C. Act, s. 49.

Verdict and judgment.  
Sect. 50.

Inspection.

Jury cannot inquire into the right.

The following are the clauses of the Lands Clauses Act, 1845, which relate to the proceedings at the inquisitions before the sheriff, and the subsequent recording of the verdict and judgment.

Sect. 49 directs, that where the inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury to the lands held therewith, the jury shall deliver their verdict (*tt*) separately for the *sum of money* to be paid for the purchase of the lands, and for the *sum of money* to be paid as compensation for the damage, to be sustained by reason of the severing of the lands taken from other lands of the same owner, or otherwise injuriously affecting such lands (*u*).

By sect. 50, the sheriff before whom the inquiry (*x*) is held is to give judgment for the purchase-money or compensation assessed, and the verdict and judgment are to be signed by the sheriff, and kept (*y*) by the clerk of the peace among the records of the quarter sessions of the county in which the lands are situate; and all persons may inspect the said verdicts and judgments, and take copies or extracts.

There was for a long time considerable doubt upon the question whether or not the jury have power to inquire into the right or title of the claimant to compensation. In 1854, however, a majority of the judges of the Court of Queen's Bench decided, in *R. v. L. and N. W. R. Co.* (*z*), that they have *not* any such power, but must assume that the claimant is entitled to compensation, and assess the damages upon that assumption. And, in 1857, the Court of Exchequer decided *Chapman v. Monmouthshire R. Co.* (*a*), in accordance with the decision of the Queen's Bench, as indeed they were bound to do. But in the former case, Erle, J., expressed an opinion, that the jury had jurisdiction to try the *right* as incidental to the question of

(*tt*) These words are directory only, and enable the company, or the claimant, at the meeting, to call upon the sheriff to keep the evidence distinct, and to require the jury to find a separate sum in respect of each claim. *Corrigal v. London and Blackwall R. Co.*, 5 Man. & G. at p. 249; *Re London and Greenwich R. Co.*, 2 Ad. & E. 678; 1 Harr. & W. 81; 4 Nev. & Man. 450; *J. v. Sheffield R. Co.*, 11 A. & E. 194; *Bradshaw's Arbitration*, 12 Q. B. 562; 17 L. J., Q. B. 362.

(*u*) See *Re Ware*, 9 Exch. 395. When compensation is assessed under a statute, which requires to ascertain the amount of compensation to be paid for lands, and in respect of other damage separately, it is the duty of the company, and not of the claimant, to see that the verdict and judgment is properly drawn up. *Re London and Greenwich R. Co.*, *ubi supra*.

(*v*) In *Taylor v. Ullmson*, 2 Q. B. at p. 1028, Maule, J., suggested that an inquisition, like a conviction, may be drawn up at any time. The inquisition should

be signed in the name of the sheriff, although the inquiry be held before the under-sheriff. *Stroud v. Watts*, 3 D. & L. 799; 15 L. J., C. P. 196; *R. v. Perkin*, 7 Q. B. 165. Where a railway company relied upon a verdict, whereby compensation was assessed for lands taken by them, in answer to an action of trespass; and it appeared that the inquisition had never been recorded, parol evidence was allowed to be given of the finding of the jury. *Manning v. Eastern Counties R. Co.*, 12 M. & W. 237.

(*y*) If the proceedings have been irregular, prohibition does not lie to prevent the verdict and judgment from being enrolled. The proper course is to quash them by certiorari. *Chabot v. Lord Morpeth*, 15 Q. B. 446; 19 L. J., Q. B. 877.

(*z*) 3 E. & B. 443. The judgments in this case contain an elaborate review of all the previous decisions, but they are too long for insertion here.

(*a*) 27 L. J., Ex. 97; 2 H. & N. 267.

amount of compensation; and upon the trial of the latter case Willes, J., stated that he adopted the views of Erle, J. In 1863, however, the Court of Queen's Bench upheld their previous decision (b). Until, therefore, the question is carried to a Court of Error, it must be considered as settled for all practical purposes, that the jury have no power to inquire into the right.

But although the judges in *R. v. L. and N. W. R. Co.* differed upon the above point, they all concurred in another point, viz., in approving of a former decision (c), in which it had been held, that, if the jury find the damage nominal or infinitesimally small, they may find the amount of compensation nil.

Jury may award nil.

If the right to compensation is denied, the question must be tried in an action for the amount assessed upon a traverse of the right (d). But in such an action the quantum of damages cannot be disputed (e).

And it seems also to be settled law (f), that the sheriff and jury have no right to inquire into the preliminary matters which precode the issuing of the warrant to the sheriff. The duty of the jury is to proceed to assess the value of, and the injury done to, the lands mentioned in the warrant, and if the warrant refers to lands which the company have not duly treated for, in pursuance of the statutory directions, the inquisition will be a nullity, and no title to the lands can be conferred thereby (g).\*

Neither sheriff nor jury may inquire whether preliminary notices have been given.

The compensation assessed in ordinary cases is in respect of the value of the lands purchased, taking into account the damage done by the severance, and the amount of all injury done or to be done to the lands held therewith, which is apparent and capable of being ascertained and estimated at the time when the compensation is awarded.\*

Compensation is assessed only for damage ascertainable at time of inquisition.

\* Page 283.

And if interest be not given by the jury, the claimant has no redress from the Court. In a case where a jury found that the claimant had been entitled to the sum awarded twelve years previous to the inquisition, and said nothing as to the interest, the Court of Session in Scotland added twelve years' interest to the sum awarded, but the House of Lords set aside the order (h).

Interest.

(b) *R. v. Metropolitan R. Co.*, 32 L. J., Q. B. 367; 8 L. T. 663; *S. C.*, nomine *Harricks v. Metropolitan R. Co.*, 4 B. & S. 315. See also *Barber v. Nottingham and Grantham R. Co.*, 33 L. J., Q. B. 193.

(c) *R. v. Lancaster and Preston R. Co.*, 6 Q. B. 759. See also *Bradby v. Southampton Local Board of Health*, 4 E. & B. 1014.

(d) *Chapman v. Monmouthshire R. Co.*, ubi supra; *Road v. Victoria Station and Pimlico R. Co.*, 32 L. J., Ex. 167; 1 H.

& C. 826; *Barber v. Nottingham and Grantham R. Co.*, ubi supra. See also ante, p. 199.

(e) *Mortimer v. South Wales R. Co.*, 28 L. J., Q. B. 129; 1 E. & E. 375; *Barber v. Nottingham, &c. R. Co.*, ubi supra.

(f) *Taylor v. Clemson*, 2 Q. B. at p. 999; 11 Cl. & F. at p. 651.

(g) *Ossler v. Cooke*, 13 Q. B. 143.

(h) *Caledonian R. Co. v. Carmichael*, L. R., 2 Sc. App. 56.

4. *By a Jury.*  
The form of the  
inquisition.

With respect to the form of the inquisition, it has been said, that, inasmuch as there is to be an extraordinary jurisdiction exercised by the sheriff, everything which is made preliminary by the act of Parliament ought to be set out on the face of the inquisition (*i*). But recent decisions have not supported this doctrine.

*Taylor v.*  
*Clemson.*

This question, as to the necessity of showing jurisdiction on the inquisition, was discussed at great length in *Taylor v. Clemson* in the Exchequer Chamber (*k*); and all the authorities on the subject will there be found collected and arranged in admirable order. The Court, in delivering the judgment, said,—

“The authority given by the statute to the railway company to take the lands of individuals for the purposes of the act, where it is exercised adversely, and not by consent, is undoubtedly an authority to be carried into effect by means unknown to the common law. And it is, therefore, contended, on the part of the plaintiff, that the same rule will apply to these proceedings which is held to apply to all other inferior jurisdictions, that, unless sufficient appears upon the face of the proceedings themselves to show that the jurisdiction exists, such proceedings are altogether void. Admitting such to be the rule of law, and not further relying on the special finding by the jury, that all which was necessary to give jurisdiction under the statute did really and in fact take place, than to observe that the whole objection is confined to the face of the proceedings themselves, the question is, whether, either expressly or by necessary intendment, the proceedings do of themselves show that they were warranted by the statute. And we are of opinion that, upon fair and necessary intendment, the jurisdiction appears upon the proceedings themselves.”

The Exchequer Chamber accordingly decided, that, when the warrant to the sheriff was annexed to the inquisition, they might be considered as one entire proceeding; and any deficiency existing in one document might be aided by reference to the other; and that, inasmuch as no particular form was prescribed by the statute, it was sufficient if the jurisdiction substantially appeared upon the face of the documents, or might be inferred therefrom (*l*).

Judgment of the  
House of Lords  
in *Taylor v.*  
*Clemson.*

But when this case was taken to the House of Lords (*m*), the arguments took a wider range, and two principal objections were urged against the validity of the inquisition, i. e., first, that it did not appear on the warrant or inquisition, that the parties had disagreed as to the sum to be paid as compensation; and, secondly, that it nowhere appeared that notice of the proceedings before the jury had been previously given, in pursuance of the statute, and that consequently no jurisdiction whatever appeared. These objections were both over-

(*i*) Per Lord Wensleydale, in *Dorchester v. Bristol and Exeter R. Co.*, 6 M. & W. at p. 339. See also *R. v. Bryshaw*, 7 T. R. 363; *R. v. Mayor of Liverpool*, 4 Burr. 2241; *R. v. Trustees of Norwich Road*, 5 A. & E. 563; 1 N. & P. 32; *R. v. South Holland Drainage*, 8 A. & E. 429;

*R. v. Croke*, 1 Cowp. 26; *R. v. Manning*, 1 Burr. 377.

(*k*) *Taylor v. Clemson*, 2 Q. B. 978; 2 Gale & D. 316.

(*l*) *Ibid.*

(*m*) *Taylor v. Clemson*, 11 Cl. & Fin. 610.

ruled by the House of Lords, and Lord Cottenham's judgment clearly expresses the grounds of this important decision.

His lordship said,—

"If the arguments of the plaintiff be well founded, the railway company acquired no title to the lands in question; and that, not from any omission of what the act required them to do for the purpose of acquiring a title, but from a defect in the form of the inquisition by which the value of the lands were assessed. If the objection be fatal to the title of the company to these lands, there can be no doubt but that similar objections will be found to apply to very many titles derived under the various acts of Parliament which have, of late years, been in operation for the carrying on of public works.

Lord Cotten-  
ham's judgment  
in *Taylor v.*  
*Clenson*.

"The special verdict finds, that everything was done which the act required for the protection of the owner of the property: the question, therefore, is purely one of form, which, if successful, would be destructive of the real merits of the case. This (although no reason for departing from any established rule) may properly be taken into consideration, if the case do not fall within the principle of decided authorities.

"The first objection to the title of the company is, that the inquisition, ascertaining the amount of the purchase-money, does not show that there was any authority under the act for such proceeding: that is, that it does not allege that the parties had not previously agreed upon such amount: for the absence of an agreement for that purpose was all that the act required to justify the warrant, and to give jurisdiction to the sheriff and jury. Now the warrant, which was referred to, and annexed to the inquisition, required the sheriff to impanel and swear a jury for the purpose of inquiring, assessing, and giving a verdict for the sum of money to be paid: and by the inquisition, taken in pursuance of this warrant, the jury find, assess and give their verdict for a sum of money to be paid for the purchase of the premises, by the said act of Parliament authorized to be taken by the said company; and the sheriff thereupon pronounces and gives judgment for such purchase-money, according to the directions of the act. It certainly does not, in terms, negative the fact of the parties having previously agreed upon the amount of the purchase-money, but it states that which is utterly inconsistent with any such fact. If the amount of the purchase-money had been previously agreed upon, the jury could not have assessed, and the sheriff could not have adjudged, the amount of such purchase-money. Whatever form might have been gone through, the amount of purchase-money would have been that which had been adjudicated upon. It will not be found, upon an examination of the cases, that any inquisition has been held defective for not alleging a fact necessarily implied from those which are alleged; and if that be so, there cannot be any ground for doing so for the first time in the present instance. This was the ground upon which the judges in the Exchequer Chamber held the proceeding to be free from objection upon this point, and which was before them, and now is sufficient to dispose of the first objection raised. Had this not been so, it would have been proper to consider whether it can be necessary, in any case, that there should be, on the proceedings, averments of facts into which the parties had no authority to inquire; and of which, therefore, they could have no judicial knowledge."

Lord Cottenham then described the effect of the decided cases (many of which are cited ante, p. 278, note (i)), and proceeded as follows:—

4. *By a Jury.*

"I have now examined all the cases which have been relied upon on either side, and the result appears to be, 1st. That if it be necessary that the inquisition should state the absence of an agreement between the parties, what appears upon the present inquisition was, in *R. v. Swansea Harbour* (n), decided to be sufficient, and in *R. v. Croke* (o), was assumed to be so, from the objection not having been taken; 2nd. That, except, in what fell from Lord Mansfield in the latter case, and from Lord Denman in *R. v. Committeemen of the South Holland Drainage* (p), there does not appear to be any authority for holding that the inquisition or other proceeding need state any matter not cognizable by the authority whence such proceedings emanate, and all reasoning appears to be against any such rule. The instances referred to by Lord Abinger (q), in the Court below, prove that such preliminary matters were not cognizable by the sheriff and jury, and could not be the subject of proof before them. How, then, can it be necessary or proper that their inquisition should state facts, of which they could not have received any proof, particularly when, by the 138th section of the act, and the authority of *Roston v. Carew* (r), such statement would have been conclusive?

"A second objection was raised in argument in this House, which I do not see noticed in the report of the case before the Exchequer Chamber, and that is the want of any statement as to notice of the proceeding before the jury, as required by the 138th section. This, if not removed by the observations before made, will be answered by the case of *Doe d. Payne v. Bristol L. Co.* (s), which decided, that what was made necessary by way of proviso in the act need not be alleged in the proceeding; but the want of it was to be brought forward by the objecting party. The affidavits show that no such case exists in point of fact."

*Ostler v. Cooke.*

The warrant and inquisition held good, although they did not recite the previous proceedings.

This case was followed by *Ostler v. Cooke* (t). There, commissioners under a drainage act, containing compulsory powers for taking lands similar to those in the Lands Clauses Consolidation Act, caused a notice to be given to the landowner, which duly stated the particulars of the land required, but the warrant subsequently issued to the sheriff, requiring him to summon a jury, merely described the land as "three acres, twelve roods and twenty perches of land in the parish of B.," which were required for the purposes of the act, without referring to the notice previously given in pursuance of the acts; and in the inquisition, the money was awarded "for the purchase of three acres, twelve roods and twenty perches of land," following the description of the land contained in the warrant. An action of trespass was brought to try the validity of this inquisition, and it was objected that the warrant and inquisition ought to have referred to the notice to treat, or at all events to have given the description and particulars of the land required, otherwise the warrant might apply to any land of the claimant, within the district. The Court, however, held that the proceedings were not irregular, and said, that by the act the jury were only to inquire into the amount of the com-

Recital of proceedings in inquisition unnecessary.

(n) 8 A. &amp; E. 439.

(o) 1 Cowp. 26.

(p) 8 A. &amp; E. 429.

(q) 2 Q. B. at p. 999.

(r) 3 B. &amp; C. 649.

(s) 6 M. &amp; W. 320, ante, p. 278.

(t) 18 Q. B. 143; 18 L. J., Q. B. 185; 18 Jur. 583.

pensation to be awarded for the land required, and the judgment was for the money awarded, and not for the land. If the commissioners should give evidence of the value of other land than that mentioned and described in their notice, the proceeding would be void, and they would have no power to enter upon any land of the plaintiff. The Court observed, that there was no question as to the identity of the land, as evidence of value was given on both sides, and there was a view; and neither by the terms of the act nor by any general rule of law was it necessary that the notice should be referred to, or any particular description of the land given in the warrant, to give jurisdiction to the sheriff and the jury. The Court added, "*The case of Taylor v. Clesmon*, in the Exchequer Chamber, and afterwards in the House of Lords, was cited on both sides, upon the argument, but the judgments in that case, and particularly that in the House of Lords appear to us to be in accordance with our view of the present case." A writ of error was afterwards brought in the Exchequer Chamber, but that Court affirmed the judgment in the Court below, in the following terms (u):—

"The question is, whether the warrant and inquisition ought to have contained, on their faces, a particular description of the lands which were valued by the jury. It certainly would have been more convenient if they had so particularized them, but the proceedings are not void because they have not done so. The effect of the inquisition is not to make a parliamentary conveyance of the lands, but only to estimate the amount to be paid by the commissioners, before they make an entry on the premises required by the notice; and, as soon as that amount is tendered to the landowner, the commissioners are at liberty to enter on the lands. If no title be made out to the land, the amount of compensation may be deposited in the Bank, under the section in the act. If evidence had been given before the jury, as to any other land than that to which the notice applied, the inquisition would have been irregular, and might have been set aside. But here the notice given to the plaintiff by the defendants described the precise quantity of the land they required, with all requisite particularity, and no question was made as to the identity of the land."

But, notwithstanding these decisions, it may perhaps be at least unobjectionable to show, on the face of the proceedings, a description of the lands taken, and that the proper notices were given by the parties upon whose application the warrant to the sheriff was issued (x).

The cases also show that it is no objection, that it does not appear, on the inquisition, that the whole of the capital had been subscribed for, although, by the terms of the statute, the compulsory powers to

Recital of subscription of capital unnecessary.

(u) *Ostler v. Cooke*, 22 L. J., Q. B. 71; 18 Q. B. 831.

(x) See the form of the inquisition, vol. II., tit. *Forms*. If the party who

demand the compensation originates the proceedings under 8 & 9 Vict. c. 18, s. 68 (see ante, p. 195), it will be easy to adapt the form to the facts of such a case.



4. By a Jury.

take lands could not be resorted to until such a subscription was made (y). Nor need it appear that a certificate of two justices had been obtained, to certify that an erroneous description of lands in the book of reference proceeded from mistake (z). Nor need it appear who is to pay the costs of the inquiry (a). These decisions are in accordance with the doctrine which was subsequently laid down in the cases already referred to.

We may now proceed to inquire what remedies exist, in cases where the proceedings before the sheriff and jury have been erroneous, or objectionable to either of the parties interested in the inquiry.

When certiorari lies to remove inquisition.

It lies if the sheriff and jury act beyond their jurisdiction.

Time for applying for certiorari.

*R. v. Bristol and Exeter R. Co.*

The act provides, that "no proceeding shall be quashed or vacated for want of form, or be removed by certiorari or otherwise, into any of the superior Courts (b). But although the certiorari is thus taken away (c), the Courts will interfere, if it clearly appears that the proceeding has related to some matter, over which the sheriff had no jurisdiction whatever; or if the proceeding itself is impeached as being invalid, on the ground of malversation (d), or that the sheriff was interested (e). A certiorari ought to be applied for promptly. Where there was an application for a certiorari on the ground that the jury had taken into account matters which were not legally the subject of compensation, but the applicants had allowed five months to expire without objection, and had paid costs, and taken various other steps upon the footing that they were valid, the Court, in exercise of its discretion (f), refused such application, and intimated also that as a general rule the writ ought not to be granted after the expiration of the time allowed for setting aside an award (g).

The case of *R. v. Bristol and Exeter R. Co.* (h) may appear, at first sight, to break in upon this rule. There a certiorari was applied for to quash an inquisition, and one of the objections relied upon was, that the lands taken by a railway company, and for which the

(y) *Doe d. Payne v. Bristol and Exeter R. Co.*, 6 Moo. & W. 320; *S. C.*, 2 Railw. Cas. 75.

(z) *Taylor v. Clemson*, 2 Q. B. 978; *S. C.*, 2 Gale & D. 346.

(a) See post, p. 293.

(b) 8 & 9 Vict. c. 18, s. 145; 8 & 9 Vict. c. 20, s. 156. A writ of certiorari always lies at common law to remove judicial proceedings. *R. v. Aburdare Canal Co.*, 19 L. J., Q. B. 251; 14 Q. B. 854.

(c) It has been decided that this clause is applicable to inquisitions. *R. v. Sheffield R. Co.*, 11 A. & E. 194. See also *R. v. Justices of Lindsey*, 14 L. J., M. C. 151;

3 D. & L. 101; 13 Q. B. 484.

(d) See *R. v. Cheltenham Commissioners*, 1 Q. B. 467; *South Wales R. Co. v. Richards*, 18 L. J., Q. B. 310; *Penny v. South Eastern R. Co.*, 26 L. J., Q. B. 225.

(e) *R. v. L. and N. W. R. Co.*, 9 L. T. 423.

(f) See *Reg. v. South Holland Drainage Committee*, 8 A. & E. 429.

(g) *Reg. v. Sheward*, L. R., 5 Q. B. D. 329; 49 L. J., Q. B. 329; 42 L. T. 363; 28 W. R. 506—aff. by C. A., 49 L. J., Q. B. 716; 9 Q. B. D. 741.

(h) 11 A. & E. 202, n.; 2 Railw. Cas. 99.

jury were summoned to assess compensation, were situate more than one hundred yards beyond the line of deviation. It was contended, in support of the writ, that, although the certiorari was taken away by the special act, yet, as the proceedings were altogether illegal, and there was a total want of jurisdiction, the certiorari would lie. On the other hand, it was contended, that, if the proceedings were merely null, the certiorari was unnecessary, and the parties entering would be liable in trespass.

The Court of Queen's Bench refused to grant the certiorari; and it appears that the learned judges adopted the argument urged by the counsel for the defendants. Littledale, J., observes,—

“The parties applying are not without remedy, for they may bring trespass, if the proceedings are void. It is argued that there will be a *prima facie* justification, if the proceedings be not quashed. I doubt whether that would be so in any case; but clearly it would not be so where there has been a deviation from the line laid down.”

It therefore appears that a writ of certiorari was refused, on the ground that the party had a sufficient remedy by action, although it was assumed that the affidavits showed that the sheriff had no jurisdiction to assess compensation for the lands which were taken for the purposes of the railway (i). • But in the subsequent case of *R. v. Sheffield and Manchester R. Co.* (k), the Court took occasion to repeat the general proposition that, whenever a want of jurisdiction appeared, it was competent for the Court of Queen's Bench to interfere by certiorari, although the writ be taken away by the express words of the statute. Lord Denman, C.J., said,—

*R. v. Sheffield and Manchester R. Co.*

“The fair import of *R. v. Bristol and Exeter R. Co.* is, that where the act done is locally and visibly out of the jurisdiction, it is then the act of a stranger; and we cannot consider it any Court at all, but leave the party to their remedy by an action of trespass; as, if an inquisition were held in Bedfordshire, to assess the value of lands in another county; but this is something sought to be shown without the jurisdiction, by extrinsic evidence, and that, too, where there is a clause in the act which, by enacting that it shall be a record, makes the sheriff's return alone evidence; and therefore a wrong-doer would be protected, if he could induce the sheriff to make a false return” (l).

And Patteson and Coleridge, JJ., without going to the extent of overruling *R. v. Bristol and Exeter R. Co.*, intimated that it was

(i) The party whose lands were taken afterwards brought ejectment against the company. But the Court of Exchequer decided that the special act authorized the company to make such a deviation as included the lands in question. See *Doe d. Payne v. Bristol and Exeter R. Co.*, 6 M.

& W. 320; 2 Railw. Cas. 75. It was not suggested by the counsel for the defendants that the inquisition was a bar to the action.

(k) 1 Railw. Cas. 537; 11 A. & E. 194.

(l) See post, p. 287.

4. By a Jury.

*South Wales R.  
Co. v. Richards.  
Accommodation  
works—jurisdic-  
tion of justices.*

not necessary to justify everything that might have been said by the Court in that case.

In another case (*m*) a landowner, whose lands had been taken and severed by the line of a railway, made a claim for compensation, which was to be assessed by a jury "in respect of the purchase of the land,—for damage to other lands by the severance of the purchased land from them,—and for injuriously affecting such other lands by the execution of the railways and works." It appeared that the line of the railway, when made, would cross an occupation road leading from the claimant's residence to the high road, and as the occupation road was crossed on a level, the claimant required that a bridge should be thrown over the railway, whilst the company contended that a level crossing was sufficient, and no definite agreement as to the communication had been arrived at, previously to the hearing of the case before the jury. Under these circumstances it was urged for the claimant, that the jury should allow for the expenses of providing a bridge, but the company alleged that the jury ought not to take the matter into their consideration at all, because the subject of communication was a matter left, by the acts, entirely for the decision of justices of the peace (*n*). The under-sheriff adopted the latter view of the case, but the jury delivered their verdict, whereby they gave several sums: first, for the value of the land purchased and compulsory possession; secondly, for severance at thirty years' purchase; thirdly, for loss of water; and, lastly, 450*l*. for "severance, owing to the crossing and expense incurred thereby."

The company thereupon obtained a writ of certiorari to quash the inquisition, on the ground that the jury had no right to entertain the question, in respect of which they had given the 450*l*.; and the Court of Queen's Bench decided that there was a clear excess of jurisdiction, in a substantial matter, and the inquisition was quashed. The Court said,—

"This rule cannot be made absolute unless it distinctly appears that, in the proceedings, the sheriff and jury have taken upon themselves to decide on a matter over which they have no jurisdiction. Where that is made out, the statutory prohibition does not apply, and the inherent jurisdiction of this Court is unrestrained; nor need the excess of jurisdiction in the Court below appear in every part of its proceeding, for it cannot give validity to one act, in itself beyond the power of the Court, because it has, at the same time, done another which it was competent to do."

(*m*) *South Wales R. Co. v. Richards*, 18 L. J., Q. B. 310; 13 Q. B. 988; 13 Jur. 1095. The Court intimated that, by the consent of the claimant, the verdict might be allowed to stand for the sums properly

awarded in respect of the unobjectionable claims. See also *Jubb v. Hull Dock Co.*, 9 Q. B. 443; *Penney v. South Eastern R. Co.*, 26 L. J., Q. B. 252; 7 E. & B. 660.

(*n*) Post, ch. IX., sect. 6.

It may, therefore, now be assumed, that the rule applicable to the removal of inquisitions is that which has been already laid down. The application of that rule is, however, not unattended with difficulties.

In the case last mentioned, it is said—"There is a great disposition to evade clauses in acts of Parliament which take away the certiorari on the alleged excess of jurisdiction; and we feel bound not to yield to attempts of this kind, unless they rest on very clear and satisfactory grounds" (o). And a very learned judge (p) has observed, "There is a perpetual endeavour to get rid of clauses which take away certiorari, by impugning the jurisdiction. Such attempts we ought carefully to watch, otherwise the clauses would be rendered nugatory." And the Court of Queen's Bench, acting on this principle, have decided, that where an inquisition had been taken before a clerk to the under-sheriff, and an assessor appointed, *pro hac vice*, by the sheriff, they not being persons specially named in the act, there was no ground for granting a certiorari (q), inasmuch as this deviation from the requisites of the act was a mere irregularity, and not an excess of jurisdiction. And where the certiorari was taken away, and the company issued a warrant to the sheriff, requiring him to assess compensation to the claimant "for damages (if any) which shall have been done by reason of the execution of the works," it was contended that the warrant was void, and that therefore the jurisdiction never attached; but the Court refused a certiorari, as the warrant (though it ought not to have contained the words "if any") gave jurisdiction (r).

Certiorari does not lie for mere irregularity.

A party who seeks to set aside an inquisition must come into Court with clean hands, for he may so conduct himself as to be held incompetent to take an objection to the inquisition, which would be perfectly good under ordinary circumstances. This rule has been applied in a case where a party treated land as his own freehold, when a negotiation for purchase was going on, and he was held to be incompetent to set up as an objection, that the lands belonged to his wife, and were copyhold, and that the inquisition awarded no compensation to the parties who held these interests in the land. He was also held to be estopped from objecting, that, by the inquisition, the company were directed to commit a trespass, by making a hedge on other land belonging to the complainant, it not being positively stated in the affidavit that less compensation had been given to him in conse-

Parties may be estopped from taking objections.

(o) 18 L. J., Q. B. 312.

(p) Patteson, J., in *R. v. Whitchurch Commissioners*, 1 Q. B. at p. 478.

(q) *R. v. Shyffield R. Co.*, 11 A. & E. 194; 1 Railw. Cas. 537. See also *Corrigul v. London and Blackwall R. Co.*, 5 Man. & G. 247.

(r) *R. v. Leicester and Preston Junction R. Co.*, 6 Q. B. 769; 14 L. J., Q. B. 84. This decision was approved of by all the judges in *R. v. L. and N. W. R. Co.*, 8 E. & B. 443. See *Bradby v. Southampton Local Board of Health*, 4 E. & B. 1014.

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quence, and it appearing that, when he demanded compensation, he had required a certain sum to be given to him, and also made it a condition that the company should erect the fence in question (*n*).

If the parties appear and take a verdict without having made any objection to a defect in the constitution of the tribunal of which they had knowledge, the Court will refuse a certiorari to bring up the inquisition (*t*).

The writ of certiorari is not therefore taken away in all cases, but the objections, which may be raised to the proceedings before the sheriff, are limited to cases where it appears that the proceeding relates to some matter over which the sheriff had no jurisdiction, or unless the proceeding itself is impeached, as being invalid on the ground of malversation.

Objections to issuing the certiorari are available on a motion to quash the inquisition when brought up (*u*).

Mode of proceeding to obtain writ of certiorari.

We shall now proceed to describe the mode of proceeding to obtain a writ of certiorari (*x*). And, first, the statutory regulations (*y*), limiting a time for issuing writs of certiorari, and requiring notice to be given of applications for them, and recognizance to be entered into before allowance, do not apply to inquisitions or other proceedings before sheriffs.

Affidavits.

The affidavits should be carefully prepared (*z*). If any important fact be stated in uncertain language, the Court will refuse the writ. And any failure of this kind is the more serious in its results, in consequence of a rule of practice, which, if not universal and inflexible, is as nearly so as possible, *i. e.*, that the Court will not allow a party to make a second application for the writ, if he has previously applied to the Court upon insufficient affidavits (*a*).

(*s*) *R. v. Committee of South Holland Drainage*, 8 A. & E. 429; and see *R. v. Justices of Surrey*, L. R., 5 Q. B. at p. 473; *Re Lord Listowel's Fishery*, 1 R., 9 C. L. 46.

(*t*) *Emanuel Hospital v. Metropolitan District R. Co.*, 19 L. T. 692.

(*u*) *R. v. Hatfield Peveret*, 14 Q. B. 298.

(*x*) It seems that the rule to show cause why the writ should not issue may be directed to the company, although the inquisition be out of their custody. *R. v. Manchester and Leeds R. Co.*, 1 Por. & Dav. 164; but see *S. C.*, 8 A. & E. 424, n. (*u*).

(*y*) See 5 Geo. 2, c. 19, s. 2; 13 Geo. 2, c. 18, s. 5; Crown Office Rules, 1886.

(*z*) The affidavits in support of the ap-

plication for the writ must be intitled "In the High Court of Justice, (Queen's Bench Division," only. The certiorari is directed to the parties taking the inquisition, adapted to the particular case, and describing the inquisition as in the rule of the Court, and is to be issued as other writs on the Crown side. *Corner's Practice*, 91.

(*a*) *Dodfield v. Painnore*, 5 A. & E. 785, n. (*a*); *R. v. Manchester and Leeds R. Co.*, 8 A. & E. 413; *R. v. Pickles*, 3 Q. B. 599, n. (*a*); *R. v. Great Western R. Co.*, 1 D. & L. 874; *Tilt v. Dickson*, 4 C. B. 736, where Wilde, C.J., said, "The strict practice has been relaxed in cases where the first application has failed in consequence of a clerical error, or from the affidavits having been incorrectly intitled."

It will, therefore, be proper that all defects in the proceedings should be positively sworn to, and, if possible, a copy of the inquisition should be annexed; or if that cannot be procured, the party making the affidavit should swear directly to his information and belief as to its contents.

Defects in proceedings should be clearly stated in the affidavit.

Thus in *R. v. Manchester and Leeds R. Co. (b)*, a party sought to set aside an inquisition on the ground that some of the lands taken by the company, and for which damages were given by the inquisition, were not included in the schedule annexed to the railway act, neither had two justices certified that the omission proceeded from mistake, and that, consequently, the company had no right to take the land; and the application was founded on an affidavit made by the owner of the lands. The Court refused the application for a certiorari, in consequence of the defective mode of stating the objections to the inquisition. Lord Denman, C.J., said,—

*R. v. Manchester and Leeds R. Co.*

“We should issue the certiorari, if it distinctly appeared that the jury had comprehended in their verdict anything which they were not authorized to include. But we cannot assume that the fact is so, unless the affidavits positively state it. They should either set out the inquisition, or show that the deponent has no copy, and then distinctly state that he is informed of, and believes, the facts raising the objection. Here all that appears as to the inquisition is, that the party ‘objects’ that certain deficiencies exist. It is said that this is an objection upon oath; but suppose he had actually said, ‘I object upon oath,’ that would merely be a solemn form of stating the objection. Then, as to the authority of the company to take the lands, and of the jury to assess the value. This should be distinctly negatived. Here all that is positively sworn to is the description in the books of reference, which is alleged to be insufficient, and the statement by the applicant in his protest, that the lands were not properly described in the act or schedule. It should be shown positively that the justices have not certified; for their certificate would give the power. To assert, generally, that it is not the fact that the statute authorizes the proceeding, is not enough; it should be stated how it fails to do so. I disclaim the principle, that we are to issue a certiorari to bring up the inquisition, on the ground that there may probably be defects; we must clearly see that facts do exist which will bring the defects before us.”

Lastly, it is important to remember that any defect or want of jurisdiction may be shown by affidavit (c).

The importance of the subject we have been discussing seems to justify a few further observations on the effect of the language which is found in the Lands Clauses Consolidation Act, which, by sect. 50, directs that,—

The effect of the inquisition and verdict.  
*L. C. Act, s. 50.*

(b) 8 A. & E. 413.  
(c) See the cases already mentioned, ante, pp. 282, 288, and *R. v. Bolton*, 1

Q. B. 68; 10 L. J., M. C. 49; *Penny v. South Eastern Co.*, 23 L. J., Q. B. 225; 7 E. & B. 680.

4. *By a Jury.*

"The sheriff, before whom such inquiry shall be held, shall give judgment for the purchase-money or compensation assessed by such jury, and the verdict and judgment shall be signed by the sheriff, and being so signed shall be kept by the clerk of the peace among the records of the general or quarter sessions of the county in which the lands, or any part thereof, shall be situate, in respect of which such purchase-money or compensation shall have been awarded, and such verdicts and judgments shall be deemed records; and the same, or true copies thereof, shall be good evidence in all courts and elsewhere, and all persons may inspect the said verdicts and judgments, and may have copies thereof or extracts therefrom, on paying for each inspection thereof one shilling, and for every one hundred words copied or extracted therefrom sixpence; which copies or extracts the clerk of the peace is hereby required to make out and to sign, and certify the same to be true copies."

How far verdict  
conclusive before  
L. C. Act.

It is believed that no case has yet arisen in which the full effect and meaning of this section have been considered. But in the following cases, which all occurred *previously* to the passing of the Lands Clauses Act, the judges appear to have felt considerable difficulty in putting a construction upon statutes which contained similar provisions (*d*).

*R. v. Nottingham  
Old Waterworks  
Co.*

In an early case (*e*), an application was made to compel a company, by mandamus, to pay the amount of compensation, where the verdict and judgment had been duly enrolled at the sessions; and it was contended that the remedy was on the record, and that a writ of mandamus was therefore inapplicable. Patteson, J., said,—

"If there be a specific remedy for this sum we cannot grant the mandamus. Now, the court of quarter sessions is to give judgment for the sum assessed by the jury, which judgment is to be conclusive; and the clerk of the peace is to sign the verdicts and judgments, which are to be registered and to become records. It seemed to me, at first, that, if these were judgments of record, they might be enforced like judgments of other Courts, by the process of the Court itself, if it had any process proper for the purpose, and, if not, by action of debt. But, on looking to the act, I doubt whether such a consequence can be admitted. These are not the ordinary records of the quarter sessions; and I have never heard of an action on a record of this sort."

The same learned judge, in a subsequent case (*f*), said,—

*R. v. Manchester  
and Leeds R. Co.*

"As to what fell from me during the argument in the present case, respecting the effect of the inquisition, considered as a judgment, I merely wished to inquire whether, if it have the effect of a judgment of a Court of record, error would not lie, and a certiorari be excluded. But I think that, in fact, this cannot be considered as a judgment. The section is drawn very loosely; but it does not, as far as I can understand it, give these proceedings an effect analogous to that of judgments of a Court of record."

(*d*) By some of the earlier statutes no conveyance appears to have been necessary to vest land in a company, after the compensation was assessed, and the inquisition recorded with the clerk of the peace. See *Bruce v. Willis*, 11 A. & E. 463. By other statutes, the conveyances of the lands were required to be enrolled at the sessions; *R. v. Leeds and Liverpool Canal Co.*, ib. 316;

but under the Lands Clauses Act, the legal title of the company to the lands taken under the compulsory powers does not seem to be complete, until a conveyance has been executed. See post, ch. VIII., s. 1.

(*e*) *R. v. Nottingham Old Waterworks Co.*, 6 A. & E. 355.

(*f*) *R. v. Manchester and Leeds R. Co.*, 8 A. & E. at p. 428.

And Littledale, J., in another case, said (g),—

*R. v. Trustees  
of Swansea  
Harbour.*

“It is said, that, because this inquisition is to be kept among the records of the quarter sessions, it ought, as the record of an inferior Court, to set forth everything which was necessary to give jurisdiction. But the enactment is merely directory, that the judgment, having been given, shall be kept among the records of sessions; and, as to the judgment itself nothing is prescribed, except that the jury shall ascertain the sum to be paid for purchase or recompense, and the justices shall accordingly give judgment for such purchase-money or recompense so to be assessed.”

It therefore appears that the enrolment of the verdicts and judgments with the clerk of the peace does not clothe them with the character of records for all purposes.

In a subsequent case it was, however, said by Lord Denman, C. J., and Patteson, J., that the effect of the record of the inquisition and judgment would be to operate as a conclusive bar in any action which might be brought to recover the lands (h).

It will be observed that in all the foregoing cases the special act provided that the verdict and judgment “should be binding and conclusive to all intents and purposes;” and then, when deposited with the clerk of the peace, they should be deemed records “to all intents and purposes whatsoever.” As these words are omitted in the Lands Clauses Act, a strong inference seems to arise that the Legislature did not intend that the verdicts and judgments when enrolled should of themselves be binding or conclusive, or that they are to be deemed records in the ordinary sense of the term; and it may be contended, that the language used in this statute will be sufficiently carried into effect, if it be construed to mean that the verdict and judgment, when enrolled, shall be deemed the record of the proceedings which actually took place before the sheriff. And it would seem that one main object of sect. 50 was to facilitate the proof of what took place before the sheriff and jury (i).

*How far verdict  
conclusive after  
L. C. Act.*

Having thus endeavoured to point out what defects in the inquisition may still be taken advantage of by certiorari, and the mode of applying for the writ, and the effect of the verdict when enrolled, we shall turn to another important branch of our inquiry.

(g) *R. v. Trustees of Swansea Harbour*, 8 A. & E. at p. 448; S. C. 1 Per. & D. 512.

(h) *R. v. Sheffield R. Co.*, 11 A. & E. 194; also *Chabot v. Lord Morpeth*, 15 Q. B. 449. But see the dictum of Littledale, J., in *R. v. Bristol and Exeter R. Co.*, 11 A. & E. at p. 204. It is also worthy of remark, that in *Doe d. Payne v. Bristol and Exeter R. Co.*, 6 M. & W. 320, the counsel for the defendants did not contend

*rigal v. London and Blackwall R. Co.*, 5 Man. & G. 219, the counsel for the plaintiff do not appear to have relied upon the demurrer to the fourth plea, on the ground that no proof except the record could be given.

(i) See Phillips on Evidence, 9th Ed. 131, and observe that the Documentary Evidence Act, 8 & 9 Vict. c. 113, was passed three months after the Lands Clauses Act.



4. *By a Jury.*

No new trial can be obtained.

It may happen that the proceedings taken on the inquisition before the sheriff are strictly regular in form and substance, and yet, through the perverseness or mistake of jurymen, or some other similar miscarriage, gross injustice may be done, in deciding the question of compensation submitted to the jury. In such a case, it is evident that a writ of certiorari will not lie to remove the inquisition, inasmuch as the writ is expressly taken away by the statute, and there is no want of jurisdiction, or any malversation on the part of the presiding officer (*k*).

Rejection of evidence.  
*R. v. Eastern Counties R. Co.*

Is, then, the party aggrieved without any remedy? Upon this important question, *R. v. Eastern Counties R. Co.* (*l*) seems to be in point. That was an application for a mandamus commanding the defendants to issue a precept to the sheriff, to summon a jury to assess damages to F. It appeared that F. was tenant from year to year of premises near Chelmsford; that the fee simple of a portion of those lands was purchased for the purpose of constructing the railway thereon; and that the company also temporarily used a portion of the remainder of the land, by passing to and fro, with carts, &c., as they were empowered to do under the special act. At the trial, F. proposed to give evidence of damage done to growing crops, by the construction of the railway; and also of damage done by the temporary user of a portion of his land; and he offered evidence to show that a temporary road had been made over his meadow, destroying the pasturage, but that the meadow had, in other respects, always remained under his control. The under-sheriff, however, rejected this evidence, upon the ground, that, by the act, authority was given to justices to award damages in respect of the temporary occupation of any land. It was urged that this provision was not applicable, as there had not been a temporary occupation, but a mere user of the land; but the presiding judge withdrew this branch of the case from the consideration of the jury. A further objection was raised that the verdict was against evidence. F. had originally claimed 524*l.*; by his witnesses he proved damage to the amount of 411*l.* The company, by their witnesses, showed that the damage was 152*l.* 10*s.*; but the jury awarded only 49*l.*

Insufficiency of damages.

Upon these facts it was contended, that, if the Court saw that obvious injustice had been done, it would not hesitate to put a party in a position to maintain his rights, but Coleridge, J., said,—

No new trial.

“This was an application for a rule, calling upon the company to show cause why a writ of mandamus should not issue, commanding them to issue a precept to the sheriff to summon a jury to assess damages for injury alleged to have been sustained by reason of the works of the railway. It appeared that such a precept

(*k*) See ante, p. 282.

(*l*) 2 Dowl. N. S. 915; 12 L. J., O. B. 271; 2 Railw. Cas. 466.

had already issued, and that a jury had sat under it to assess damages in respect of all the causes of damage for which compensation is now sought to be obtained, and that they returned a verdict for 49l. It is said that this is a sum grossly under the amount which the party is entitled to claim; that he proved damage to the amount of nearly 500l., and the insufficiency of the verdict is attributed to two causes: one, that the sheriff excluded one entire set of damages from the consideration of the jury, on the ground they were properly recoverable under a particular section of the company's act before a justice; another that, although the claimant proved a much larger amount of damage than that found, the jury, from some personal cause, chose to give a verdict for an inadequate amount. It was admitted, that a direct motion for a new trial could not be made, and no doubt that was a proper admission, for the proceeding is the creature of the act of Parliament; and the section of the act, by which it is directed that such a proceeding shall be had, makes the verdict final; but, even if this be not so, I am at a loss to see what machinery this Court has to direct a new trial. But it was said that the Court might direct a second precept to issue. It appears to me, however, that if I acceded to such a proposition, I should only be doing a thing indirectly, which cannot be done directly. If a mandamus should go, the return would be that a precept has been already issued, and the only answer to such a return would be 'Yes; but justice has not been done under that precept;' so that, in point of fact, it would still come to the same thing, that the Court would be called upon to grant a new trial. I am informed that a like application has been made in the full Court in another case, and that it was refused. I do not know whether injustice has been done or not; but even if it has, I have no power to interfere, and no rule, therefore, can go in this case" (m).

And in delivering judgment in *R. v. L. and N. W. R. Co.* (n), it was observed by the Court, that—

Sheriff's jury  
unsatisfactory  
tribunal,

"It must be admitted that even for a preliminary and inconclusive trial, a sheriff's jury are an unsatisfactory tribunal, and their decision additionally objectionable because no error in the direction given to them, nor any mistake or even perverseness in their finding, can be reviewed as in a trial at *Nisi Prius*."

It seems to be a peculiar anomaly, that a new trial may be had to correct any miscarriage which may occur in trials at *Nisi Prius*, where the judges of the superior Courts preside, whilst the very important questions which arise in compensation cases are subject to no further inquiry or supervision, provided the sheriff had jurisdiction to enter upon the inquiry, and there was no malversation on the part of the presiding officer.

And it is now provided by sect. 41 of the Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119,\* that either the company or the party entitled to compensation may apply to a judge, "who shall, if he think fit," make an order for trial of the question in the same manner

Alteration of the  
law in 1868.

\* Ante, p. 273.

(m) See *Re Stroul*, 8 C. B. 502, where the question was discussed but not decided as to the power of the Court to interfere with the award of an umpire under sect. 27.

(n) 3 E. & B. 475. See also *Barber v. Nottingham and Grantham R. and Canal Co.*, 15 C. B., N. S. 728.

4. *By a Jury.*

as an ordinary action. Such an order, if made, will bring all proceedings under the control of the Court "as in ordinary actions therein," so that a new trial may be directed.

Remedies to  
recover money  
as compensa-  
tion.

*Recovery of Amount awarded.]* We will now suppose that the question as to the amount of the compensation has been finally decided, the title to the lands perfected (o), and that nothing remains but to recover the compensation from the company. We therefore proceed to consider what remedies may be resorted to, by the party entitled to receive the money awarded by the verdict of the jury, and the costs attending the inquiry.

This question was very much discussed in the Courts of Law, when it first became necessary to provide a remedy to recover compensation under some of the earlier special railway acts. Some of these acts were altogether silent as to the mode in which the money awarded should be recovered. In other instances it was enacted, as has been already shown, that the inquisition, verdict and judgment should be enrolled by the clerk of the peace, and should be deemed records to all intents and purposes. The question soon arose, whether the proper mode of recovering money awarded as compensation was by action of debt—on the case—or debt upon the statute, or by an action of debt as upon a judgment of record,—or whether the only remedy was by indictment. All these modes of proceeding were suggested in an early case, as an answer to an application made for a mandamus to compel a company to pay a sum of money awarded as compensation. The Court of Queen's Bench, without determining that one or more of the before-mentioned remedies might not exist, determined that, in the absence of any other clear remedy, they ought to issue a mandamus; and this was the mode of proceeding usually adopted to enforce the payment of compensation money (p).

Action to re-  
cover compen-  
sation awarded  
by a jury.

But the Courts having afterwards decided that an action of debt (q) may be brought on an inquisition and verdict, this proceeding has superseded the old remedy by mandamus. In such an action the plaintiff may recover not only the amount assessed for compensation, but also the costs attending the inquiry, if he is entitled to them, and they have been taxed (r). A more summary

(o) Post, tit. *Title to Lands*.

(p) *R. v. Nottingham Old Waterworks Co.*, 6 A. & E. 355; *R. v. Trustees of Swansea Harbour*, 8 A. & E. 439; *R. v. Deptford Pier Co.*, 8 A. & E. 910; *R. v. Great Western R. Co.*, 3 Q. B. 72, n.

(q) *Corrigall v. London and Blackwall*

*R. Co.*, 5 Man. & G. 219; *R. v. Hull and Selby R. Co.*, 6 Q. B. 70; *Williams v. Jones*, 13 M. & W. 628; *East and West India Dock Co. v. Gatliffe*, 3 Macn. & G. 178.

(r) *South Eastern R. Co. v. Richardson*, 15 C. B. 810; *Chapman v. Monmouth-*

remedy is, however, provided by the statute to obtain the costs, by the following sections.

The costs of the inquisition are provided for by sect. 51. This section follows the principle of sect. 34,\* and enacts, that where the verdict of the jury shall be given for a *greater* sum than the sum "previously offered" by the company, all the costs of such inquiry shall be borne by the company; but if the verdict of the jury be given for the same, or a *less* sum than the sum "previously offered" by the company; or if the claimant fail to appear, "one-half of the costs of summoning, impannelling and returning the jury," and of taking the inquiry and recording the verdict, if any, shall be defrayed by the claimant, and the other half by the company.

Costs of inquisition.

L. U. Act, s. 51.

\* Page 264.

To understand this section and the decisions upon it, sects. 38, 46, and 68 must be carefully studied. By sect. 38, before issuing the warrant for a jury "for settling any case of disputed compensation," the promoters must give not less than ten days' notice to the other party of their intention, "and in such notice shall state" what sum of money they are willing to give for the lands to be taken from him, and the damage to be sustained by him. By sect. 46 "not less than ten days' notice of the time and place of the inquiry shall be given" by the promoters to the other party. These sections *prima facie* apply to the more numerous cases where the promoters themselves take the first step by notice to treat for lands *required* and the like. Sect. 68 applies to the less numerous cases where the claimant takes the first step, and enacts that if any party shall be entitled to compensation for lands *taken or injuriously affected*, and for which satisfaction has not been made, he may have the same settled if he claim more than fifty pounds by a jury or arbitration, at his option, and if he desire a jury, may give notice stating, amongst other particulars, the amount claimed, twenty-one days after the receipt of which notice the promoters "shall issue" their warrants for a jury, or in default, shall be liable to pay the amount of compensation claimed.

The 68th section, it will be observed, is silent as to the costs of an inquiry. It has been decided that the 51st (s) and 46th (t) sections are incorporated with it, but that the 38th (u) is not. The words "previously offered" therefore, in sect. 51, apply to every kind of inquiry, but bear a different meaning according as the inquiry is

*shire R. Co.*, 2 H. & N. 267; 27 L. J., Ex. 27; *Mortimer v. South Wales R. Co.*, 28 L. J., Q. B. 129; 1 E. & B. 375; *Fletcher v. Great Western R. Co.*, 28 L. J., Ex. 147.

(s) *South Eastern R. Co. v. Richardson* 20 L. J. C. P. 122: affirming decision

below, 20 L. J., C. P. 236.

(t) *Metropolitan R. Co. v. Turnham*, 32 L. J., M. C. 249; *Hayward v. Metropolitan R. Co.*, 33 L. J., Q. B. 73.

(u) *Railstone v. York, &c., R. Co.*, 19 L. J., Q. B. 464; 14 Jur. 1021.

## 4. By a Jury

under the leading sections of the act as to compensation for land required, &c., or under sect. 68, as to compensation for land taken or injuriously affected. If the inquiry be under the leading sections of the act, the words "previously offered" mean "offered in the notice under sect. 38" (c), and no subsequent offer has any effect on the costs (y). If the inquiry be under sect. 68, the words "previously offered" mean offered within a reasonable time previously, that is, contemporaneously with or before the notice of the time and place of the inquiry under sect. 46 (z). Therefore an offer of a smaller sum may be amended by the offer of a larger, if the offer of the larger be in time under sect. 46 (a), and it would seem also that an informal prior offer not stated in the notice under s. 38 will not, as against a subsequent offer so stated, be the sum "previously offered" under sect. 51. It has been even suggested that the notice under sect. 38 may be wholly revoked with the result that an offer in the substituted notice may be good (b).

In any case the offer of a lump sum, including all costs as yet incurred, is bad (c).

What costs recoverable.

The claimant, if he recover more than the sum offered, is entitled to all the costs as defined by sect. 52 (d). If a claim be made under more heads than one, and the jury give the same aggregate amount as that offered by the company, but apportion the items differently, the claimant is not entitled to costs (e). A claimant has been held to be entitled to the costs both of an abortive inquiry (where the inquisition was quashed on the ground of misdirection) and of the inquiry which followed it, and resulted in a good verdict (f).

Where no sum offered.

It will be observed, that sect. 51 does not, any more than sect. 34, make provision for the case of the company making no offer at all. In such a case it would seem that the claimant is entitled to his costs, unless the jury award nil (g). It has been decided, too, under sect. 34, that the claimant is entitled to costs where no offer is

(c) *R. v. Master Manley Smith*, L. R., 12 Q. B. D. 481; 53 L. J. Q. B. 115; 32 W. R. 275; *Pearson v. Great Northern R. Co.*, L. R., 7 Q. B. 785, n.; 18 W. R. 259; *Fitzhardinge (Earl) v. Gloucester and Berkeley Canal Co.*, 41 L. J., Q. B. at p. 18, per Blackburn, J.

(y) See the cases *supra*.

(z) *Metropolitan R. Co. v. Turnham*, 32 L. J., M. C. 249; *Hayward v. Metropolitan R. Co.*, 33 L. J., Q. B. 78.

(a) *Hayward v. Metropolitan R. Co.*, *supra*.

(b) Per Lord Coleridge, C. J., in *Reg. v. Master Manley Smith*, *supra*, and per Blackburn, J., in *Fitzhardinge v. Gloucester and Berkeley Canal Co.*, L. R., 7 Q. B., at p. 785 and note (s), *ante*.

(c) *Bulls v. Metropolitan Board of Works*, L. R., 1 Q. B. 337; 35 L. J., Q. B. 101; 13 L. T. 702; 14 W. R. 370.

(d) *Army v. South Eastern R. Co.*, 19 L. J., Q. B. 11. The costs of a mandamus to the sheriff to hold the inquiry would not be included. *R. v. Sheriff of Middlesex*, 5 Q. B. 365. See also *R. v. Gardner*, 6 A. & E. 112; *R. v. Sheriff of Warwickshire*, 2 Railw. Cas. 661.

(e) *Hayward v. Metropolitan R. Co.*, *ubi supra*.

(f) *Reg. v. North London R. Co.*, 51 L. J., Q. B. 241; 30 W. R. 272.

(g) See per Alderson, B., in *South Eastern R. Co. v. Richardson*, 20 L. J., C. P. 122.

made (*h*), and the principle of that decision would seem to be applicable to cases under sect. 51. On any other construction of the statute, the company might avoid costs by simply refraining from making an offer. Moreover, it is expressly provided by sect. 38, that the company, in giving notice of their intention to summon a jury, must state what sum of money they are willing to give, so that the company, if they make no offer at all, are in default. Where no offer is made, and the company, notwithstanding an adverse verdict, turn out not to be liable in law, sect. 51 has no application (*i*).

By sect. 52, the costs of the inquiry are, in case of difference, to be settled (*j*) by one of the masters of the Court of Queen's Bench of England or Ireland (*k*), according as the lands are situate, on the application of either party (*l*). Such costs include all reasonable costs, charges and expenses incurred in summoning, impannelling and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and solicitors, recording the verdict, and judgment thereon and otherwise incident to such inquiry (*l*).

Costs to be settled by the master.  
Sect. 52.

There is a conflict of authority as to the finality of the taxation. The better opinion would seem to be that the master's taxation cannot be reviewed by the Court on motion, inasmuch as he is intrusted with the duty of taxation as a person, and not as an officer of the Court. It is doubtful whether the Court would interfere either by certiorari or mandamus, with an improper taxation (*m*).

Review of master's taxation.

By sect. 53, if any such costs be payable by the company, and within seven days after demand be not paid to the party entitled to receive the same, they are recoverable by distress (*n*), and on application to any justice "he shall issue his warrant accordingly." If the

Costs recoverable by distress.  
Sect. 53.

(*h*) *Martin v. Leicester Waterworks*, 27 L. J., Ex. 432.

(*i*) *Todd v. Metropolitan District R. Co.*, 24 L. T. 435; 19 W. R. 720.

(*j*) The fee for settling these costs, one shilling per folio, is payable in money, not in stamps, 31 & 32 Vict. c. 119, s. 45.

(*k*) It is remarkable that the taxation of costs form no part of the ordinary duties of the master in Ireland: that is done by the taxing officer. See 7 & 8 Vict. c. 107; 30 & 31 Vict. c. 129. In *Maher v. Southern and Western R. Co.*, 13 Ir. L. R. 364, it was said by Blackburne, C. J., that the Court of Queen's Bench had no jurisdiction to compel the officer to tax these costs.

(*l*) The master has no jurisdiction to tax costs incidental to railway inquiry as between solicitor and client, but only as between party and party. *O'Farrell v.*

*Limerick and Waterford R. Co.*, 13 Ir. L. R. 365.

(*m*) See *Owen v. L. and N. W. R. Co.*, L. R., 3 Q. B. 54; 37 L. J., Q. B. 54, in which the authorities are reviewed; *Ross v. York and Newcastle and Berwick R. Co.*, 13 Jur. 610; *Metropolitan R. Co. v. Turnham*, 32 L. J., M. C. 249; 14 C. B., N. S. 212; *Dray v. South Eastern R. Co.*, 7 D. & L. 307. In a case under sect. 54, it was said that the master might refuse to tax costs if no costs were due. *Fitzhardinge (Earl) v. Gloucester and Berkeley Canal Co.*, 41 L. J., Q. B. 316.

(*n*) A mandamus will not be granted to recover costs, where a remedy by distress is given by the statute. *R. v. London and Blackwall R. Co.*, 3 D. & L. 404; 4 Railw. Cas. 119; *R. v. Hull and Selby R. Co.*, 6 Q. B. 70.

4. *By a Jury.* costs be payable by the claimant, they may be deducted and retained by the company out of any money awarded by the jury to the claimant. The payment or deposit of the remainder, if any, of such money is to be deemed payment and satisfaction for the whole thereof. If the costs exceed the amount of the money awarded, the excess is recoverable by distress on application to a justice of the peace.

Attachment  
of purchase-  
money.

The purchase-money, even where ascertained by the verdict of a jury, is not a debt "due or accruing" to the vendor, so as to be capable of being attached under the garnishee Orders of the Rules of Court, Ord. XLV., Rule 3 (o).

(o) *Howell v. Metropolitan District R. Co.*, L. R. 19 Ch. D. 508; 51 L. J. Ch. 158; 45 L. T. 707; 30 W. R. 100.

## CHAPTER VII.

## ON THE INVESTMENT OR PAYMENT OF PURCHASE-MONEY AND COMPENSATION, AND COSTS ATTENDING INVESTMENT.

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1. <i>The Investment or Payment of Purchase-money and Compensation . . . . .</i>	297	3. <i>Whether Money deposited is to be considered as Real or Personal Estate . . . . .</i>	318
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1. *The Investment or Payment of Purchase-Money and Compensation.*1. *Modes of Investment.*

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ALTHOUGH, as has been shown,\* the Lands Clauses Consolidation Act enables tenants for life, and other persons under various disabilities, to sell lands to a railway company, such parties are not entitled to take the purchase-money or compensation coming from the company for their own use, but it must be in such and some other cases invested for the benefit of the parties interested.

The following are the provisions of section 69 with respect to sums of 200*l.* or more coming to parties having limited interests, or prevented from treating, or not making title :—

Investment of sum of 200*l.* or more coming to party under disability.

L. C. Act, s. 60.

If the purchase-money or compensation be payable in respect of any lands taken by the company from any corporation, tenant for life or in tail, married woman (*a*) seised in her own right and entitled to dower, guardian, committee of lunatic, trustee, executor, or administrator, or person having a qualified interest only, which he is not entitled to sell except under the Railway Acts (*b*), the amount is to be paid into the Bank of England (*c*) or Ireland, as the case may be, and the monies remain so deposited, until the same be applied (*d*) to some one or more (*e*) of the following purposes :—

(*a*) See Married Women's Property Act, 1882.

(*b*) As to Settled Land, see also Settled Land Act, 1882, 45 & 46 Vict. c. 38, s. 32 and s. 53, by which latter section a tenant for life in exercising the powers of the act is trustee for all parties interested.

(*c*) By the Supreme Court Funds Rules, 1886, rule 39, if the lands be in England or Wales, the money "shall be placed in the books at the pay office to the credit of *Per parte* the promoters of the undertaking,

in the matter of the special (citing it), and some words shall be added in each case briefly expressive of the nature of the disability to sell and convey, by reason of which the money shall be so paid in, which particulars shall be stated in the request for the direction for the lodgment."

(*d*) As to the costs of such application, see sect. 80.

(*e*) At the option of the claimant. *Re De Beauvoir's Trusts*, 29 L. J., Ch. 567, per Turner, L. J.



1. <i>Modes of Investment.</i>	1. In the redemption of the land-tax, or the discharge of any incumbrance affecting the land, or affecting other lands settled therewith to the same or like uses, trusts or purposes: or,
Discharge of debts.	
Purchase of other land.	2. In the purchase of other lands to be conveyed, limited and settled upon the like uses, trusts and purposes, and in the same manner as the lands in respect of which such money shall have been paid, stood settled: or,
Rebuilding.	3. If such money shall be paid in respect of any buildings taken under the authority of the acts, or injured by the proximity of the works, or injured by the works, in removing or replacing such buildings, or substituting others in their stead, in such manner as the Chancery Division of the High Court shall direct: or,
Payment.	4. In payment to any party becoming absolutely entitled to such money.
Court will order investment on petition. Sect. 70.	By sect. 70, such money may be so applied, as directed by sect. 69, upon an order of the Court, made on the petition of the party who would have been entitled to the rents and profits of the lands in respect of which the money was deposited; and until the money can be so applied, it may, upon the like order, be invested in the funds, or in government or real securities ( <i>f</i> ), and the interest, dividends and annual proceeds thereof paid to the party who would for the time being have been entitled to the rents and profits of the lands.
See sections on ss. 69 and 70. Settled Land Act, 1882, s. 32.	It is now proposed to treat together the numerous cases on the 69th and 70th sections; but it should be premised that the Settled Land Act, 1882, s. 32, which will be hereafter referred to ( <i>g</i> ), has, by materially enlarging the powers of investment, materially diminished the importance of many of them. The 69th section provides for the application of the purchase-money in (1) redemption of land-tax, or discharge of incumbrance; (2) the purchase of other lands; (3) the restitution of buildings; and (4) payment in cash. The 70th section provides the procedure by which this is to be accomplished, and for interim investment, and payment of dividends.

To treat of these in their order:—

1. Land tax and incumbrances.

Where a special act contained a similar provision as to redemption of the land-tax, it was decided that a tenant for life, who had re-

(*f*) The Master having reported against the propriety of allowing money, as a general principle, to be invested on mortgage, Knight Bruce, V.-C., said, as he was doubtful on the point he would not go against the decision of the Master. *Ex parte Franklyn*, 17 L. J., Ch. 166; 12 Jur. 642; 5 Railw. Cas. 206; *Ex parte Craven*, 17 L. J., Ch. 215, Shadwell, V.-C., refused a similar application. But *In re Lomax*, 34 Beav. 294; and *In re Wilkinson*, 37 L. J., Ch. 384, it was allowed; and in the latter case. Malins, V.-C., thought

*Ex parte Franklyn* carried the doctrine to an extent not warranted by the modern practice of the Court. And see *In re William Smith's Estate*, L. R., 9 Eq. 178; *In re Sewall's Estate*, L. R. 18 Eq. 278. *In re Fryer's Settlement*, *Fryer v. Salisbury and Dorset Junction R. Co.*, L. R., 20 Eq. 468, Hall, V.-C., directed the purchase-money to be invested in East India Four per Cent. Stock. See also the cases collected in *Re Taddy's Estate*, 43 L. J., Ch. 192, n.

(*g*) See n. 306. note

deemed before the act, might reimburse himself out of the proceeds of the lands purchased of him by the company (*h*). Leases are an "incumbrance affecting the land" within the act (*i*). The application of part of the fund derived from the sale of glebe to the extinguishment of a drainage rentcharge (having eleven years to run), has been refused (*k*).

Bonds issued to secure money borrowed by a corporation, which was payable out of the borough fund, which was a fund made up in part of the rents of the real estate of the corporation, and mortgages of the tolls of the cattle-market and market-hall, have been held to be "debts" affecting the land of the corporation (*l*).

As to debts, &c. affecting other lands settled therewith, &c.—

If the lands of a municipal corporation are taken, the purchase-money may be devoted to payment of mortgage monies secured on other lands belonging to the same corporation (*m*).

The question what kind of lands may be purchased under section 69 has given rise to several decisions. 2 Purchase of other lands.

In *Re Cunn's Estate* (*n*), Knight Bruce, V.-C., doubted whether the Court was authorized to order deposited money arising from the sale of freehold property to be invested in a copyhold estate; but upon a representation that the master had found that it was for the benefit of all parties interested that the purchase should be made, he made the order as prayed. But in a subsequent case (*o*) in which he refused to allow the purchase-money of freeholds to be invested in leaseholds, he expressed doubts if he had acted rightly in *Re Cunn's Estate*.

In another case (*p*) the Lords Justices made an order for re-investment in copyholds, where the greater part of the lands sold to the railway company was of a like tenure. And where the petitioners were charitable trustees, having an absolute legal title (*q*), Malins, V.-C., allowed the purchase-money of freeholds to be invested in leaseholds (*r*).

As to leaseholds, the purchase-money of which when invested is insufficient to give a tenant for life the same benefit as the lease, see *In re Pfleger* (*s*), in which case a government annuity, equal to the Leaseholds.

(*h*) *Ex parte Lord Northwick*, 1 Y. & Coll., Exch. 166.

(*i*) *Ex parte Corporation of Sheffield, Re Manchester, Sheffield and Lincolnshire R. Co.*, 21 Beav. 162; 25 L. J., Ch. 587; *Ex parte Mayor of London*, 37 L. J., Ch. 375.

(*k*) *Kirkstall (Rector), ex parte*, L. R., 20 Ch. D. 203.

(*l*) *In re Derby Municipal Estates*, L. R., 3 Ch. D. 289; 30 W. R. 729.

(*m*) *Ex parte Corporation of Cambridge*.

5 Railw. Cas. 204; 6 Hare, 30; 12 Jur. 450.

(*n*) 19 L. J., Ch. 376; 15 Jur. 3.

(*o*) *Ex parte Macaulay*, 23 L. J., Ch. 815; 23 L. T., O. S. 263.

(*p*) *Re Browne*, 6 Railw. Cas. 733; 16 Jur. 158.

(*q*) See *Re Spurstowe's Charity*, L. R., 18 Eq. 279.

(*r*) *In re Rehoboth Chapel*, L. R., 19 Eq. 180; 44 L. J. Ch. 375; 31 L. T. 571; 28 W. R. 405.

(*s*) L. R., 6 Eq. 426.

1. Modes of Investment.

net income from the leaseholds, was ordered to be purchased; and *In re Phillips* (t), where the Court directed a reference to an actuary to ascertain how much of the capital ought to be paid in each year to the tenant for life.

**Rectory.**

Where money had been paid into Court by a railway company as compensation for injury to lands belonging to a rectory, the rector presented a petition under section 69, praying that the fund in Court might be applied to defray costs incurred in inclosing certain other lands, which were waste lands allotted to the rectory under an inclosure act. *Romilly, M. R.*, on the authority of a case previously decided by *Wigram, V.-C. (u)*, made the order (x).

There is not necessarily any objection to an investment of the purchase-money in land situate out of the jurisdiction of the Court (y).

**Equity of redemption.**

The money will not be allowed to be invested in the purchase of an equity of redemption (z). A sum of 450*l.*, which was in Court until it should be laid out in lands to be settled to the "like uses," was ordered to be applied to new buildings, the master having reported that sum necessary (a). In another case the sum of 30*l.*, which remained in Court after the greater part of the purchase-money had been laid out in the purchase of other lands, was allowed to be applied in *lasting improvements* (b).

But *Parker, V.-C.*, said that the rule he laid down was not to allow sums exceeding 20*l.* to be paid out under such circumstances (c). Where only 20*l.* 10*s.* remained, *Shadwell, V.-C.*, refused to allow it to be devoted to the payment of the extra costs of the tenant for life (d).

**3. Buildings.**

It has been repeatedly held that purchase- or compensation-money may be laid out in building. Thus, where a company took land belonging to a charity on which almshouses were erected, and paid into Court the sum awarded as compensation for the land and rebuilding the almshouses, *Shadwell, V.-C.*, ordered the money to be paid to the trustees of the charity upon an undertaking to apply it in rebuilding the almshouses (e); and in another case, *Shadwell, V.-C.*, authorized the application of purchase-money to the alteration and improvement of almshouses (f). Upon the petition of the incumbent,

(t) *L. R.*, 6 Eq. 250; and see *In re Treacher*, 18 *L. T.* 810, and *In re North*, 19 *L. T.* 43.

(u) *Ex parte Queen's College, Cambridge*, 14 *Beav.* 159, n.

(v) *Ex parte Lockwood*, 14 *Beav.* 158.

(y) *In re Taylor's Estate*, 40 *L. J.*, Ch. 454, where the land which it was proposed to buy was in the Isle of Man.

(z) *Ex parte Craven*, 17 *L. J.*, Ch. 215.

(a) *Ex parte Shaw*, 1 *Y. & Coll., Exch.*

508 (under a special act).

(b) *Ex parte Barrett*, 19 *L. J.*, Ch. 415; 15 *Jur.* 3.

(c) *In re Bateman*, 21 *L. J.*, Ch. 601; see also *Re Lord Egremont*, 12 *Jur.* 618.

(d) *Ex parte Rector of Birdcote*, 17 *L. J.*, Ch. 414; 5 *Railw. Cas.* 209.

(e) *Ex parte Thorne's Charity*, 12 *L. T.*, O. S. 286.

(f) *Re Buckinghamshire R. Co.*, 14 *Jur.* 1065.

Wood, V.-C., ordered the purchase-money of glebe land belonging to a parsonage to be paid to the nominee of the archbishop (under 1 & 2 Vict. c. 106, s. 66), to be applied in building a vicarage house (g). In one case, Hall, V.-C., on the petition of the rector, ordered part of the purchase-money of the glebe to be used in the repair of the rectory buildings, but refused to allow it to be expended for the restoration of the chancel of the church, or in paying off money borrowed from the governors of Queen Anne's Bounty (h); in another case as to glebe, Hall, V.-C., declined to allow a rentcharge under a Drainage Act to be extinguished by the payment of a lump sum out of the fund in Court, even though the incumbrancer consented to the application (i); and in another, Bacon, V.-C., while ordering the application of the money towards necessary improvements and additions to the parsonage house, directed that it should be paid to the bishop's secretary on his undertaking to apply it (k). A railway company took part of a glebe, and, the rectory house being old and dilapidated, an arrangement was made with the consent of the bishop and the patron that the old house should be pulled down and a new house built on the site, partly at the patron's expense, partly with money advanced by the Commissioners of Queen Anne's Bounty, and partly with the purchase-money to be paid by the company. The company fell into difficulties, and did not pay the purchase-money until after a bill for specific performance had been filed against them by the rector, when they paid into Court; in the meantime the rector had advanced the amount and the building had been completed. On petition by the rector to have the purchase-money paid out to him, the Lords Justices held that they had no power to make the order, and that the consent of all parties could not entitle them to do so (l). The same point had been previously decided by the Lords Justices on the petition of the tenant for life of a settled estate (m), the only difference being that in the earlier case the remaindermen did not consent. James, L. J., there said:—

“We cannot sanction the fund being expended in repaying the petitioner what he has already expended. That is never done unless the expenditure was properly a charge upon the inheritance, for which there is no pretence here.”

In that case, however, it was also held that the Court had power to order the fund to be applied in building or rebuilding cottages or

Rebuilding mansion-house, &c.

(g) *Ex parte Incumbent of Whitfield*, 2 J. & H. 610; 30 L. J., Ch. 816.

(h) *Re Louth and East Coast R. Co., Ex parte Rector of Grimoldby*, L. R., 2 Ch. Div. 225.

(i) *Kirkstunton (Rector), Ex parte*, L. R., 20 Ch. D. 203; 51 L. J., Ch. 581.

(k) *Ex parte the Rector of Claypole*, 42

L. J., Ch. 778.

(l) *Williams v. Aylesbury and Buckinghamshire R. Co.*, L. R., 9 Ch. 684; 31 L. T. 521.

(m) *In re Leigh's Estate*, L. R., 6 Ch. 887. See also *Drake v. Trefusis*, L. R., 10 Ch. 361, and *Re Speer's Trusts*, L. R., 3 Ch. D. 262.

1. Modes of Investment.

other edifices on the estate (*n*), on the ground that this was a permanent augmentation of the property, but that the Court would not do that if the remaindermen objected. The Court declined to sanction a proposed outlay on repairs and alterations on the mansion-house or on repairs generally on other parts of the estate, on the ground that it was the duty of the tenant for life to keep up the buildings, although he might be by law dispensable for waste (*o*).

A tenant for life was allowed by Wood, V.-C., to receive 220*l.* upon an undertaking to lay it out, with 80*l.* of her own, in building labourers' cottages upon the estate (*p*). Where a railway passed through a farm and divided it, so that the buildings could not be conveniently used for one part of the farm, Romilly, M. R., held that compensation paid for damage might be applied in the erection of new buildings on that part of the farm which required them (*q*).

However, in another case, Stuart, V.-C., refused to make an order for the application of part of the purchase-money towards the erection of a new farmhouse and buildings upon an estate which had been purchased with other part of the purchase-money, saying that it was not the purchase of other lands, and could not be considered as a debt or incumbrance (*r*).

Payment of con-  
tract price to  
trustee,  
to tenant for  
life.

The contract price of repairs has been ordered to be paid to a trustee (*s*), and as much as 362*l.* has been allowed to be paid to a tenant for life on the production of an affidavit that half the contract price for the erection of buildings has been expended thereon (*t*).

Making of roads.

In an Irish case, where the tenant for life petitioned that the purchase-money might be paid out to him on his undertaking to lay it out in making roads on the rest of the property, which would permanently improve it, and increase the value of the inheritance, Sullivan, M. R., held that he had no power to make such an order (*u*).

Where lands were sold by agreement to a company, by a dean and chapter and their lessee, for a long term of years, for one entire sum

(*n*) See also *Ex parte Rector of Shipton-under-Wychwood*, 19 W. R. 549; and *Ex parte Rector of Cranston*, L. R., 1 Ch. Div. 477; *In re Aldred's Estate*, L. R. 21 Ch. D. 228.

(*o*) It is not easy to reconcile with this decision the application of a portion of the fund for the repair of the rectory buildings in *Re Louth and East Coast R. Co., Ex parte Rector of Grimoldby*, supra; perhaps the repairs there required amounted to necessary improvements and additions, as in *Ex parte the Rector of Claypole*, supra.

(*p*) *Re Wight's Estate*, 6 W. R. 718, and see *Re Davies' Estate*, 27 L. J., Ch. 712;

3 De G. & J. 141; *Re Dunmer*, 31 L. J., Ch. 490; *Ex parte Corporation of Liverpool*, 35 L. J., Ch. 655; L. R., 1 Ch. 596.

(*q*) *Ex parte Milward*, 29 L. J., Ch. 245; 27 Beav. 571. See also *In re Johnson's Settlement*, L. R., 8 Eq. 348.

(*r*) *Re Rudyard's Estates*, 6 Jur., N. S. 818.

(*s*) *Aldred's Estate, In re*, L. R., 21 Ch. D. 228.

(*t*) *Earl de Grey's Settled Estates, In re*, W. N. for December 17th, 1887.

(*u*) *In re Belfast Water Commissioners*, L. R., 5 Eq. 63.

of 1,760*l.*, and the whole of the purchase-money was paid into the Bank by the company, and the lessee afterwards petitioned the Court to apportion and pay him his share of the purchase-money, Knight Bruce, V.-C., said that he had too much doubt of the authority of the Court to apportion the money in such a case, to make it proper for him to be active in doing so, and he therefore refused to accede to the application (x). (An order was afterwards taken by consent in this case, to the effect that the dividends should be paid to lessee for the residue of the term or until further order, without prejudice to any question, the lessee undertaking to pay the rent reserved by the lease.) Where by the terms of a special railway act the company were empowered to purchase lands belonging to the corporation of Lincoln, in which lands the freemen were interested, and the purchase-money was directed to be deposited and applied for the permanent benefit of the freemen, as the Court of Chancery should direct, Parker, V.-C., declined to entertain a petition as to the application of the fund, until a public meeting of the freemen should have been convened, and a committee appointed on their behalf, who could instruct counsel to appear (y).

As to the practice of the Court in entertaining these petitions, it seems that the Court will direct a reference to the Chief Clerk before a summary order is made. Thus, where an application was made by the parish officers to have a sum of money, which had been paid into Court by a railway company, paid out to them for the purpose of buying other land, and erecting other buildings, in substitution of those taken by the company, Knight Bruce, V.-C., directed a reference to the Master (z). And it has been decided that the Court will not, by one order, direct a reference as to the propriety of a proposed re-investment, and as to title, and for the completion of the purchase, by payment to the vendors, and for taxation and payment of costs. After the Chief Clerk has approved of the title and settled the conveyance, the matter must come again to the Court for approval and further directions (a). But in some cases such applications have been granted when supported by proper affidavits, showing

Practices of the Court upon petitions relating to money invested.

(x) *Ex parte Ward*, 17 L. J., Ch. 249.  
(y) *Re Great Northern R. Co.*, 6 Railw. Cas. 738; 21 L. J., Ch. 621; 16 Jur. 756. As to payment out of Court to a dowress, see *In re Hull's Estate*, L. R., 9 Eq. 179; 39 L. J., Ch. 392. Payment to trustees, *In re Jones's Trust Estate*, 39 L. J., Ch. 190; *In re Illman's Will*, 39 L. J., Ch. 760; *In re Gooch's Estate*, L. R. 3 Ch. D. 742. Payment to a person who would have obtained title by length of possession but for the dealings with the company. *Re Evans*, 42 L. J., Ch. 357. But see as

to this, *Re Hollinsworth*, 24 L. T. 317; 19 W. R. 580.

(z) *Ex parte Churchwardens of Bicester*, 5 Railw. Cas. 205. So, per Shadwell, V.-C., *Ex parte Craven*, 17 L. J., Ch. 215; *Re Martin*, 22 L. J., Ch. 218; 17 Jur. 30.

(a) *Ex parte Duckle*, 16 Jur. 511; explaining *Ex parte Metherell*, 16 Jur. 72; 20 L. J., Ch. 629, where a contrary rule is erroneously supposed to have been laid down.

1 Modes of Investment.

that the title to the lands about to be purchased has been approved by counsel, and the deeds verified, without a reference to the Master (*b*). Where a rector, who had presented a petition for investment, died pending the proceedings, and the new rector consented that the proceedings should go on, Parker, V.-C., held that no supplemental order was necessary (*c*).

A railway company took some land which had been demised by a dean and chapter for twenty-one years on a beneficial lease. The company purchased the lessee's interest, and purchased the reversionary interest of the dean and chapter separately, and on a petition praying that this latter purchase-money might be invested, Knight Bruce, V.-C., directed the money to be invested in lands; and after providing for the payment of the rent reserved to the dean and chapter, if such a provision was necessary, he directed the remainder of the dividends to be accumulated, until the expiration of the twenty-one years, and added to the principal, and the order was taken in that form (*d*). So where compensation was awarded to the bishop, in respect of the value of the reversion of church lands leased for lives, Turner, V.-C., ordered the money to be invested, and the dividends to be accumulated until either of the lives should die, inasmuch as the bishop for the time being was entitled to nothing, until the lease should become renewable (*e*). And where the lands taken were, with other lands, subject to the payment of an annuity by the owner, and the purchase-money was duly deposited, but no conveyance of the lands to the company had been executed in consequence of a dispute as to who were necessary parties to join, Knight Bruce, V.-C., ordered the dividends to be paid to the owner of the lands, and directed the company to pay the costs of his petition (*f*). But if the annuitants join with the owner in a petition, the dividends will be ordered to be paid to the former (*g*). Where lands were taken which belonged to the trustees of charities, under the Municipal Corporation Act (5 & 6 Will. 4, c. 76), the purchase-money was ordered to be invested, and the payment of the dividends to be made to any two of the trustee for the time being (*h*).

When parties having numerous interests apply, the order for payment is usually accordingly.

On a petition for reinvestment, by tenant for life, notice need not be given to remainderman.

(*b*) See *Ex parte Vicar of East Dereham*, 21 L. J., Ch. 677, by Kindersley, V.-C.

(*c*) *Ex parte Rector of Lea*, 21 L. J., Ch. 776.

(*d*) *Ex parte Dean and Chapter of Gloucester*, 19 L. J., Ch. 400; 15 Jun. 239; and see *Ex parte Rector of Lambeth*, 4 Railw. Cas. 231.

(*e*) *Ex parte Bishop of Winchester*, 16 Jur. 648; and see *Ex parte Archbishop of*

*Canterbury*, 2 De G. & S. 365.

(*f*) *Ex parte Cofield*, 11 Jun. 1071.

(*g*) *Re Loundes*, 20 L. J., Ch. 422. As to when a portion of the corpus of the fund will be ordered to be sold to pay an annuitant, see *Ex parte Wilkinson*, 3 De G. & S. 633.

(*h*) *Re Colton's Charity*, 20 L. J., Ch. 163.

foregoing section, it is not necessary to serve notice of the petition upon the parties in remainder.

In a case where this question arose, the Lords Justices inquired of the Registrar whether it was the practice to serve the *cestuis que trustent*, and were answered in the negative. Lord Cranworth, L. J., then said,—

“If the question had come before me in 1832, when the first statutes were passed, I think my decision would probably have been in accordance with the practice hitherto adopted; but when it appears as matter of fact that this practice has gone on for twenty years, and that no inconvenience has resulted therefrom, I am certainly not prepared to say that the same practice should not be persevered in.”

Sir J. L. Knight Bruce, L. J., also said,—

“By way of security in cases of this description, there is the superintendence of the Master, the improbability of the tenant for life seeking to injure the inheritance, and, lastly, the presence of the railway company, who, if anything gross were done, and they held to have connived therewith, would probably be themselves treated upon the footing of trustees, and thus have to pay the money over again” (i).

Nor is it necessary, when an application is made to re-invest money deposited, to give notice of the petition to the company who paid in the money (j). And in a case in which the company were improperly served with notice, on a petition to have the dividends paid to the husband of one of the parties interested, Knight Bruce, V.-C., ordered the petitioners to pay the costs incurred by the company (k).

Not to the  
company.

Payment may be made to trustees having a power of sale (l), even if the power of sale has not yet, by the terms of the trust, come into operation (m), and without service on any *cestui que trust* (n). Where the purchase-money of land on the seashore was claimed by the lord of the manor, to whom the company had given notice to treat, but had paid the money into Court in consequence of the Crown having claimed the land as part of the foreshore, and filed an information accordingly, the Court ordered the petition of the lord of the manor to stand over until the information had been heard (o).

4. Payment to  
party absolutely  
entitled.

(i) *Ex parte Staples*, 16 Jur. 158; *S. C.*, 1 De G., M. & G. 294; 21 L. J., Ch. 251; 6 Railw. Cas. 788. As to service on remaindermen and trustees where there is a suit, and their costs, see *Wilson v. Foster*, post, p. 315.

(j) *Ex parte Rector of Kirkby Overblow*, 19 L. J., Ch. 829, per Shadwell, V.-C.

(k) *Ex parte Hordern*, 12 Jur. 848; 2 De G. & S. 268.

(l) *Hobson's Trusts, In re*, L. R., 7 Ch. D. 708. *C. A. Ward's Estates, In re*, L. R., 28 Ch. D. 100; 33 W. R. 149.

(m) *Evan's Settlements, In re*, L. R., 14 Ch. D. 511.

(n) *Thomas's Settlements, In re*, 45 L. T. 746; 30 W. R. 244.

(o) *Lowestoft Manor, In re, Reeve, Ex parte*, L. R., 24 Ch. D. 253.



1. *Modes of Investment.*

Money under  
Lands Clauses  
Act is "cash  
under control  
of the court."

*St. John's College  
Case.*

Investment  
under Settled  
Land Act, 1882,  
sect. 32.

Investment in  
Chambers.

Sums from 20%  
to 300% to be  
paid to trustee

Unit 20% to be  
paid to parties.  
Sect. 72.

Sums above 20%  
coming to parties,  
under disability  
to be paid into bank.  
Sect. 73.

It is now settled by the *St. John's College Case* (p), after many contradictory decisions collected in the report of that case, that money paid into Court under the Lands Clauses Act is "cash under the control of the Court" under 23 & 24 Vict. c. 38, s. 10, whereby general orders may be made for the investment of such cash, either in 3 per cent. Consols, New, or Reduced, "or in such other stocks, funds or securities," as may be directed in such general orders (q).

By section 32 of the Settled Land Act, 1882, 45 & 46 Vict. c. 38, money in Court under the Lands Clauses Act, and "liable to be laid out in the purchase of lands to be made subject to a settlement" (r), may be, "in addition to the mode of dealing authorized by the act under which the money is in Court," invested as capital money arising under the Settled Land Act. The modes of investment are given by section 21 of that act, and include (*inter alia*) the payment for any of the numerous improvements authorized by section 25 of the act, and leasehold land held for sixty years or more.

Applications for the payment out of Court of sums not exceeding 1000*l.* (s), and "for interim and permanent investment," and for payment of dividends (t), must be made in chambers by summons in all ordinary cases, though in special cases they be made in Court by petition (u).

If the purchase-money or compensation exceed 20*l.*, and is less than 300*l.*, it may be either paid into the Bank, and applied for the above-mentioned purposes, or, with the approbation of the company, may be paid to two trustees nominated in the manner prescribed, to be by them applied to the same purposes. Any such sum not exceeding 20*l.* is payable to the parties who were entitled to the rents and profits of the land, for their own use; or in case of coverture, infancy, lunacy, or other incapacity of the parties, then for their use to their respective husbands, guardians, committees, or trustees.

All sums therefore exceeding 20*l.*, payable under a contract with any person not entitled to dispose of the lands absolutely, are to be paid into the Bank, or to trustees, as above mentioned, for the sole benefit of the several parties beneficially interested; but it is expressly

(p) *St. John Baptist College, Oxford, Ex parte, Metropolitan and District Railways Act*, *In re*, C. A., L. R., 22 Ch. D. 93; 31 W. R. 53. In this case the railway company was ordered to pay the costs of the appeal.

(q) See R. S. C., 1883, Order XXII., rule 17, adding Bank Stock, East India Stock, Exchequer Bills, 2½ per Cents., and mortgages of freehold and copyhold estates in England and Wales.

(s) R. S. C. Ord. LV., Rule 2, sub-s. 2: *Maidstone and Ashford R. Co., In re*, 32 W. R. 181; *Mudgich, In re*, L. R., 25 Ch. 371 (payment to person absolutely entitled).

(t) R. S. C. Ord. LV., Rule 2, sub-s. 7. Payment to the master and fellows of 7,000*l.* upon their undertaking to apply it in building has been held not to be within this rule, *Jesus College, Cambridge, Ex parte*, 50 L. T. 583, per Kay, J.

provided that it shall be in the discretion of the Court, or the trustees, as the case may be, to allot to any tenant for life, or for any other partial or qualified estate, for his own use, a portion of the sum so paid, as compensation for any injury, inconvenience, or annoyance, which he may be considered to sustain, independently of the actual value of the lands to be taken, and of the damage occasioned to the lands held therewith, by reason of the taking of such lands and the making of the works (x).

Under this section a tenant for life is perfectly at liberty to contract for compensation money to be paid in the event of a company's extension bill passing. When he has received such money, he is a trustee in respect of it for the parties entitled to the inheritance, who can themselves make no further claim (y).

Where any purchase-money or compensation paid into the Bank has been paid in respect of any lease, for a life or lives, or years, or for a life or lives and years, or any estate in lands less than the fee-simple, or of any reversion (z) dependent on any such lease or estate, "it shall be lawful" for the Court, on the petition of any party interested in such money, to order that the same shall be laid out, and paid, in such manner as the Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion, in respect of which such money shall have been paid, or as near thereto as may be (a). The construction of this section has been held by the Court of Appeal, in *Askeu v. Woodhead* (b), to be that where a lease-

Court may direct application of money in respect of leases or reversions.  
Sect. 74.

(x) Thus, where glebe lands had been taken, 30*l.*, part of the purchase-money, was ordered to be paid to the rector, to pay for the necessary alterations in fences. *Ex parte Rector of Little Steeping*, 5 Railw. Cas. 207; and see *Re Duke of Marlborough*, 13 Jur. 738.

(y) *Taylor v. Gloucester and Midhurst R. Co.*, L. R., 4 II. L. 628; 39 L. J., Ex. 217. As to what costs the tenant for life is entitled to under sect. 73, see *In re Earl of Berkeley's Will*, *In re Gloucester and Berkeley Canal Act*, 1870, L. R., 10 Ch. 56; *In re Strathmore Estates*, L. R., 18 Eq. 338; *Ex parte the Perpetual Curate of Whitworth*, 24 L. T. 126.

(z) See the cases where church lands have been taken, ante, p. 301.

(a) A testator bequeathed a leasehold estate, determinable on his own life and that of another person, to trustees, upon trust to one for life, with remainders over; and directed that his trustees should renew the lease by substituting another life for his own. A railway company took part of the estate, and the purchase-money

new the lease, and the other life dropped. Stuart, V.-C., decided that the tenant for life was entitled to the principal of the stock in Court. *Re Deanjory's Trusts*, 22 L. J., Ch. 430. Where the tenant for life and remainderman had concurred in demising a house at a rack-rent, and during the term for which it was demised the house was taken and the purchase-money paid into Court, and the property having greatly increased in value, the purchase-money when invested would yield much more than the amount of the rent, Lord Romilly, M.R., held that the tenant for life was only entitled to the amount of the rent during the residue of this term, and that the surplus income during that time must be accumulated. *In re Meek's Estate*, L. R., 7 Eq. 72; and this principle, which was first laid down in *Re Wootton's Estate*, L. R., 1 Eq., 589, by Kindersley, V.-C., was followed in *Re Wilkes' Estate*, L. R., 16 Ch. D. 597. See also as to the practice under sect. 74, *In re Crane's Estate*, L. R., 7 Eq. 322; *Ex parte the Trustees of St. Thomas's Church Lands, Bristol*, 23

1. Modes of Investment.

Upon deposit being made, the owners of the lands to convey, or, in default, the lands to vest in the company, upon a deed-poll being executed by them.

Seck. 75.

Where parties refuse to convey, or do not show title, or cannot be found, the purchase-money to be deposited.

Seck. 76.

Upon deposit being made a receipt to be given, and the lands to vest upon a deed-poll being executed.

Seck. 77.

Se

hold interest is taken from a life tenant, he is entitled to receive an annuity of such an amount as will exhaust the purchase-money in the number of years which the lease has to run.

Upon deposit in the Bank of the purchase-money or compensation, the owner of the lands, including in such term all parties enabled by the act to sell, "shall," when required so to do by the company, duly convey such lands to the company, or as they shall direct; and in default thereof, or if he fail to adduce a good title to their satisfaction, "it shall be lawful for" the company, "if they think fit," to execute a deed-poll under their common seal, containing a description of the lands, in respect of which the default was made, and reciting the purchase and other particulars; and thereupon all the estate and interest in the lands vests absolutely in the company, and, as against the owner and all parties on behalf of whom he is enabled to sell, the company is entitled to immediate possession of the lands.

If the owner of the lands, on tender of the purchase-money or compensation, refuse to accept the same, or neglect or fail to make out a title to the satisfaction of the company (*d*), or if he refuse to convey the lands, as directed by the company, or if he be absent from the kingdom, or cannot be found, or fail to appear on the inquiry before a jury, the company may deposit the purchase-money or compensation payable in the Bank, in the name and with the privity of the Paymaster-General in England (*e*), or of the Accountant-General of the Court of Exchequer in Ireland, to be placed, except in the cases otherwise provided for, to his account there, to the credit of the parties interested (describing them so far as the company can do), subject to the control and disposition of the Court.

Upon the deposit of money being made, the cashier of the Bank "shall give" to the company, or to the party paying in such money by their direction, a receipt for the money, specifying for what and for whose use it was received, and in respect of what purchase it was paid in; and it shall be lawful for the company, if they think fit, to execute a deed-poll under their common seal, containing a description of the lands in respect whereof the deposit was made, and declaring the circumstances under which, and the names of the parties to whose credit the deposit was made; and thereupon all the estate and interest in such lands of the parties for whose use, and in

and overruling *Pfeffer, In re*, L. R., 6 Eq. 426.

(*d*) See *Doe v. Manchester, Bury and Rosendale R. Co.*, 14 M. & W. 687; 9 Jur. 949; 15 L. J., Ex. 208; 2 Car. & Kir. 162.

(*e*) Formerly the Accountant-General;

but by the Chancery Funds Act, 1872, the office of the Accountant-General was abolished, and the Paymaster-General entrusted with his duties. Chancery business is, by the 8th section, transacted at the "Chancery Pay Office."

respect whereof the purchase-money or compensation was deposited, vests absolutely in the company, and as against such parties they are entitled to immediate possession of the lands.

Upon the application by petition of any party making claim to the money so deposited, or any part thereof, or to the lands in respect whereof the same was deposited, or any part of such lands, or any interest in the same, the Court may, in a summary way, as to the Court shall seem fit, order such money to be "invested in the public funds," or may order distribution thereof, or payment of the dividends thereof (f), according to the respective titles of the claimants, and may make such other order in the premises as to the Court shall seem fit (g).

Application of monies so deposited.  
Sect. 78.

By sect. 79, if any question arise respecting the title to the lands in respect whereof the monies were paid or deposited, the parties respectively in possession of the lands, as being the owners thereof, or in receipt of the rents, as being entitled thereto at the time of the lands being purchased or taken, are to be deemed to have been lawfully entitled to such lands, until the contrary be shown to the satisfaction of the Court (h); and unless the contrary be shown, the parties so in possession, and all parties claiming under them, or consistently with their possession, are to be deemed entitled to the money so deposited, and to the dividends or interest of the annuities or securities purchased therewith, and the same are to be paid and applied accordingly. Under this section a person showing title by adverse possession only will be deemed the owner (i).

Parties in possession to be treated as owners.  
Sect. 79.

(f) Applications for payment of dividends are made in chambers.

(g) Where the company had given notice to the plaintiffs to treat, and an award had been made by an umpire, and the plaintiffs having filed a bill, the Court made a decree that the company were bound to perform the terms of the award, and, it appearing that they had taken possession and accepted the title, they were ordered to pay the amount of the award with interest and costs; but afterwards the company disputed the title and paid the amount of the award into Court. *Bacon, V.-C.*, on the plaintiffs' petition, ordered this amount to be paid out to the plaintiffs under sect. 78. *Gulliers v. Metropolitan R. Co.*, L. R., 11 Eq. 410. As to an order to revive proceedings on the death of the petitioner, *In re Youl*, 42 L. J., Ch. 900. As to the necessity for a new order where there has been a transmission of interest, *In re Jolliffe's Estate*, L. R., 9 Eq. 668. As to payment to tenant for life, of part of dividend arising from purchase-money of lands subject to beneficial leases, see *Griffith's*

*Will, In re*, 49 L. T. 161.

Where the land, being foreshore, was claimed by the Crown, the Court directed the petition of the landowner for payment of the purchase-money to him to stand over until the information of the Crown had been heard. *Lowestoft Manor v. G. H. L. Co.*, *In re, Reeve, Ex parte*, L. R., 24 Ch. D. 253.

(h) This section seems to be intended only as a direction to the Court how it should act in any case in which it should be unable to arrive at a satisfactory conclusion as to the parties entitled to receive the money; but it would be a misdirection, if the jury were directed to the provisions of this section, as confirmatory of the title of the parties in possession of the land. Per *Kindersley, V.-C.*: *Freeman of Sunderland v. Bishop of Durham*, 16 Jur. 370; 21 L. J., Ch. 145. See *Re Hollinsworth*, 21 L. T. 347; 19 W. R. 580.

(i) *Metropolitan Street Improvement Act, In re, Chamberlaine, Ex parte*, L. R., 14 Ch. D. 823.

2. *Costs of Investment.*

L. C. Act, s. 80.  
Costs of purchase, of investment, of re-investment, and of payment into Court, to be borne by company.

\* Page 308.

† Page 312.

‡ Page 313.

2. *Costs attending the Investment of Monies.*

The Lands Clauses Act requires the company to pay all the costs relating to the investment of monies paid into the Bank, and the subsequent proceedings relating thereto.

By sect. 80, in all cases of monies deposited in the Bank under the provisions of that or the special act, or an act incorporated therewith (*k*) (except where such monies shall have been so deposited by reason of the wilful refusal (*l*) of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required,\*) "it shall be lawful for" the Court to order (*m*) the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the company, that is to say, the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof (*n*), other than such costs as are otherwise provided for, and the costs of investment of such monies in government or real securities,† and of the re-investment thereof in the purchase of other lands,‡ and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends (*o*) and interest of the securities upon which such monies

(*k*) *Re Ellison*, 25 L. J., Ch. 379; 8 De Gex, M. & G. 62.

(*l*) A refusal founded upon an opinion of counsel that the party was not bound to convey the land, is not a wilful refusal; it must be a refusal arising from mere will or caprice, and not the exercise of reason. *Ex parte Bradshaw*, 16 Sim. 174; 12 Jur. 888; *Re Windsor, &c., R. Co.*, 12 Beav. 522; *Ex parte Railstone*, 15 Jur. 1028; *Ex parte Dushwood*, 28 L. J., Ch. 299; *Re Metropolitan District R. Co.*, *Ex parte Lawson*, 17 W. R. 186.

(*m*) The order should follow the words of the act. *Re Edmunds*, 35 L. J., Ch. 538. Where money has been paid in under sect. 85, the company, on performing the condition of the bond mentioned in that section, is entitled to repayment under sect. 87, and the Court has no jurisdiction to order costs to be paid out of the particular fund. *Ex parte North and Brecon R. Co.*, L. R., 9 Ch. 263; 43 L. J., Ch. 277; 30 L. T. 3, reversing Bacon, V.-C., and following *Ex parte Stevens*, 2 Ph. 772.

(*n*) The costs occasioned by a reference to the Master, as to the propriety of a sale of part of a lunatic's estate to a company, were ordered to be paid by the company under this section. *Re Taylor*, 1 Macn. & G. 210. Also, the costs of the heir at law of a lunatic, appearing before the

master. *Re Walker*, 15 Jur. 161; 20 L. J., Ch. 474; *Pierard v. Mitchell*, 12 Beav. 486. Also on a sale of lands by the devisees in trust of a testator, whose estate was in the course of administration in a suit, the costs of a petition for transferring the purchase-money from the account of the railway act to that of the suit. *Dinning v. Henderson*, 2 De G. & S. 485. (See *Haynes v. Barton*, post, p. 316.) Also, the costs of preparing and verifying the execution of a power of attorney, by parties entitled to the fund residing in Jersey. *Ex parte Great Southern and Great Western R. Co.*, 10 Ir. Eq. R. 222; also, the costs of apportionment of rents, under sect. 119. *Re London, Brighton, and S. O. R. Co.*, L. R., 1 Ch. 599. Also, the costs of abortive proceedings before a jury under sect. 85. *Ex parte Morris*, L. R., 12 Eq. 118; 40 L. J., Ch. 543. Also the costs of paying out money where the company had paid it in upon an adverse claim being made which was afterwards withdrawn. *The Duke of Norfolk's Settled Estates*, 31 L. T. 79; 22 W. R. 517. But not, as being too remote, costs of new scheme for school. *St. Paul's Schools, Finsbury, In re*, 52 L. J., Ch. 454.

(*o*) Semble, that these words do not extend to make the company liable to the costs of the payment of the dividends. *Ex*

shall be invested, and for the *payment out of Court* (p) of the principal\* of such monies or of the securities whereon the same shall be invested, and of all proceedings *relating thereto*, except such as are occasioned by litigation between adverse claimants (q). But the costs of one application only, for re-investment in land, are to be allowed, unless it appear to the Court, that it is for the benefit of the parties interested that the monies should be invested in the purchase of lands in different sums, and at different times, in which case "it shall be lawful for the Court, if it think fit," to order the costs of any such investments to be paid by the company (r).

\* Page 316.

Under sect. 80, then, the company (s) are liable to pay the costs, including therein all reasonable charges and expenses incident thereto, of the following matters:—

*parte Athorpe*, 3 Y. & Coll. 396; *Mitchell v. Newell*, 3 Railw. Cas. 515. Where the purchase-money of lands taken by three railway companies was paid into Court, and the tenant for life presented three petitions for payment of dividends, Wood, V.-C., intimated that in future the costs of only one such petition would be allowed. *Ex parte Lord Broke*, 11 W. R. 504.

(n) This applies to an application made for the transfer of the fund to the credit of another cause in Court. *Kindersley, V.-C., Mellin v. Bird*, 22 L. J., Ch. 599, and post, p. 317.

(o) See post, p. 316. Where one of several persons applies for an aliquot share of purchase-money paid into Court, it is not necessary to serve the other parties entitled with notice of the application. Per Lord Langdale, M. R., *Re Midland R. Co.*, 11 Jur. 1095. And if they appear, the company are not liable to pay the costs of their appearance. *Mellin v. Bird*, ubi supra. The company are liable to pay the costs of infants, who, having attained their majority, petition to have the fund in Court paid to them. *Ex parte Slater*, 18 L. J., Ch. 431. But upon an application to withdraw money, the company are not liable to pay the costs of the defendants in another suit in equity, who were interested in the fund, and who were necessarily served with notice that the application was about to be made. Per K. Bruce, V.-C., *Hore v. Smith*, 14 Jur. 55. But see *Liggins v. Burton*, post, pp. 312—317. Where an order for costs omitted the usual words, excepting costs of adverse litigation, the Lords Justices, upon appeal, ordered their insertion. *Re Cant's Estate*, 29 L. J., Ch. 119; 6 Jur. N. S. 183. And see *S. C.*, 1 Giff. 12; 4 De G. & J. 503. The word "such" refers to costs, not proceedings, ibid.

(r) In two cases where the Court had a discretion as to the allowance of the costs of investment, the costs of two applications

were given. *Ex parte Eton College*, 3 Railw. Cas. 271; *Ex parte Trustees of Waste Lands of Roanmore*, ibid. 513. In another case, where the costs of a third investment out of a sum of 125,000*l.* were asked for, the Vice-Chancellor granted the application. *Re St. Katherine's Dock Co.*, 3 Railw. Cas. 514; and see *Re Merchant Taylors' Co.*, 10 Beav. 485, and *Jones v. Lewis*, 2 Macn. & G. 163; *Re London, Brighton, &c. R. Co.*, 18 Beav. 608. In *Re Vinodrey*, 3 Giff. 224; 30 L. J., Ch. 885, the costs of two abortive attempts to re-invest in land, and of a deed disentailing the money, were allowed by Stuart, V.-C. See also *Re Curney's Trusts*, 26 L. T. 308; 20 W. R. 407. And in *Re St. Bartholomew's Hospital*, 4 Drow. 425, where the purchase-money had originally been only 1,056*l.*, Kindersley, V.-C., allowed the costs of a third re-investment of a portion which did not exhaust the fund. In fact, there seems no limit except that there must be a reasonable exercise of discretion on the part of those investing. *Re London Bridge Acts*, coram Wood, V.-C., 11 W. R. 81; *Brandon v. Brandon*, 32 L. J., Ch. 20; and see *S. C.*, 31 L. J., Ch. 333, as to the costs of various bands of parties appearing separately on petition to dispose of money paid for compensation. See also *Re Apperley's Estate*, 11 L. T. 335; 13 W. R. 134; and for case of relief from costs of future re-investment, see *Gedling Rectory, In re*, 53 L. T. 244.

(s) Where there is a large fund formed of payments by several companies, the general rule is, that they must divide the costs of re-investment equally and not rateably; but the ad valorem stamp must be divided rateably. *Ex parte Bishop of London*, 29 L. J., Ch. 575; 2 De G., F. & J. 14; *Ex parte Corpus Christi College, Oxford*, L. R., 13 Eq. 334; 41 L. J., Ch. 170. But where there is great inequality in the amounts contributed, the costs will be apportioned rateably. *Ex parte*

2. *Costs of Investment.*

1. Of the *purchase or taking (t) of the lands*, or which have been incurred in consequence thereof, other than such costs as are by the act otherwise provided for.
2. Of the *investment* in government or real securities of all monies deposited in the Bank (except in certain special cases, see the section, ante, p. 307).
3. Of the *re-investment* thereof *in the purchase of other lands*.
4. Of *obtaining proper orders* for any of the purposes aforesaid.
5. Of *orders for the payment of the dividends* and interest of the securities whereon the monies are invested (u).
6. Of *orders for the payment out of Court of the principal* of such monies, or of the securities whereon the same shall be invested, and of *all proceedings relating thereto*, except such as are occasioned by litigation between adverse claimants.

The cases upon 1, 4 and 5 of these divisions of the subject have been already mentioned in the notes, but those upon 2, 3 and 6 appear to require a more lengthened notice.

Costs of investment in government security.

First, as to the second of the above divisions, viz., the investment of the money in government or real security.

Brokers' commission on the purchase of stock is a part of the cost of the investment (v). And the practice of the Court is to order the investment to be made without deducting brokerage, and direct the company to pay the amount of the brokerage to the petitioner (w).

Where the monies had been once invested in government stock, and a subsequent application was made for an investment on mortgage, it was more than once held that the second investment was to be considered a permanent one in regard to future costs (x). But the cases to this effect must now be taken to be overruled (y); and a direction that the company shall not be required to pay the costs of a future investment would be refused. It may be remarked here, that unless the money remain in Court to an account intitled in the matter of the special act, the jurisdiction of the Court to order pay-

*Governors of St. Bartholomew's Hospital*, L. R., 20 Eq. 369; 32 L. T. 652. See *Re Maryport, &c. R. Co.*, 32 L. J., Ch. 811; 32 Beav. 397.

(t) This includes an entry under s. 85. *Charlton v. Rollston*, L. R., 28 Ch. D. 237.

(u) Applications for payment of dividends are made in chambers, R. S. C., 1883, Ord. LV., Rule 2, sub-s. 7. As to apportionment of dividends, see *Re Longworth's Estate*, 1 Kay & J. 1. The company are not liable to pay the costs of a petition for payment of dividends after property resettled. *Re Pick*, 81 L. J., Ch. 495. But they will have to pay costs of petition for payment to new trustees of a

re-constituted charity. *Shakespeare Walk School, In re*, L. R., 12 Ch. D. 179.

(v) *Ex parte Trinity House*, 3 Hare, 95. As to surveyor's commission, see *Attorney-General v. Drapers' Co.*, L. R., 9 Eq. 69.

(w) *Re Brailmont*, 22 L. J., Ch. 915; *Re Buckinghamshire R. Co.*, 2 W. R. 2. For the practice under the earlier special acts, see *Ex parte Hunt*, 4 Y. & Coll. 468, and the cases there cited.

(x) *Re Lomax*, 31 Beav. 294; *Re Flomon's Trust*, L. R., 10 Eq. 612.

(y) *Re Blyth's Trusts*, per Lord Selborne, for M. R., L. R., 16 Eq. 468; 28 L. T. 890; *Re Stewart's Estate*, L. R., 18 Eq. 278; 30 L. T. 855.

ment of costs is gone (x) ; and that part of the fund may be sold out in order to pay the costs of a conveyance to the solicitor of the vendor, if the company by becoming insolvent should be unable to pay those costs under sect. 82 (a).

It appears that where a tenant for life petitions for interim investment of the purchase-money and payment to him of the dividends, prior incumbrances need not be served, and if they are served their costs will not be allowed as against the company (b).

The costs of proceeding by petition and of serving the official trustees of charity lands have been allowed in a case where lands of a charity regulated by a scheme of the Charity Commissioners were taken (c).

Secondly, as to the third of the above divisions, viz., as to the costs of re-investment in the purchase of other lands.

Costs of re-investment in other lands.

If lands are purchased for a larger sum than the money deposited, the difference being paid by the party interested in the investment, the company is not liable to pay additional costs caused by reason of the price paid being greater than the deposit (d). Where the money was sought to be re-invested in land on a contract throwing on the purchaser costs which in an open contract would be borne by the vendor, the company were held liable to pay only such costs as in an open contract would be the purchaser's (e). In a case where land and two cottages had been taken, and the tenant for life having entered into a contract for the erection of two other cottages, asked that the purchase-money might be paid to him, the costs of a petition were allowed (f).

It will have been observed that sect. 69 authorizes the application of purchase-money or compensation to some one or more of four different purposes, viz.—

1. Redemption of land tax or discharge of incumbrances ;
2. Purchase of other lands ;
3. Buildings ;
4. Payment to person entitled absolutely ;

whilst this part of sect. 80 now under consideration only throws upon the company the costs of (2) re-investment in the purchase of other

(x) *Fisher v. Fisher*, L. R., 17 Eq. 340.  
(a) *Re Globe Lands of Great Yeldham*, L. R., 9 Eq. 68.

(b) *In re Morris' Settled Estates*, L. R., 20 Eq. 470.

(c) *Stafford's Charity, In re*, W. N., December 24th, 1887.

(d) *Ex parte Hodge*, 16 Sim. 159 ; 12 Jur. 239 ; *Re Brammer*, 14 Jur. 236. As to costs of making a good title to the purchased lands, see *Jones v. Lewis*, 11 Jur. 511 ; *Re Strachan's Estate*, 9 Hare. 185.

These two cases, however, were decided under special acts, differing in some respects from the Lands Clauses Acts.

(e) *Ex parte Governors of Christ's Hospital*, L. R., 20 Eq. 605. As to the costs of investing the purchase-money of leasehold in freehold estate, see *Re Parker's Estate*, L. R., 13 Eq. 495 ; 41 L. J., Ch. 473.

(f) *Earl de Grey's Settled Estates, In re*, W. N., for December 17th, 1887.



2. *Costs of Investment.*  
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*lands*, and accordingly we find it decided that where the money is applied to the discharge of debts or incumbrances (*g*), or in the erection, alteration or improvement of buildings (*h*), only the costs of the petition for payment of the money out of Court have been thrown upon the company.

Land tax.

But it is clearly settled that the costs of the application of the purchase-money in the redemption of land tax are payable by the company (*i*). In another case (*k*), however, Sir J. Romilly, M. R., in authorizing the application of compensation-money to the erection of *new buildings*, refused to fix the company with the costs of the petition, saying the point was settled by *Re Buckinghamshire R. Co.* (*l*), and the costs must come out of the fund in Court. But neither in this case nor in *Re Buckinghamshire R. Co.*, does the attention of the Court appear to have been called to that part of sect. 80 which appears clearly and justly to throw upon the company in all cases the costs of an order for the payment of the principal out of Court as distinct from the costs of re-investment, a distinction which appears from the reports frequently to have been lost sight of. But, in a later case (*m*) before Wood, V.-C., in which he ordered the purchase-money of glebe land to be paid to the incumbent, to be applied in building a vicarage house, this part of sect. 80 appears to have been more prominently brought before the Court, and accordingly he fixed the company with the costs of the petition (*n*), saying,—

*Ex parte Whitfield.*

“An order for the application of railway money in permanently improving buildings was made by Lord Cranworth in the case of the Buckinghamshire Railway, though the costs were not there given. With respect to the costs, I think the language of sect. 80 is sufficiently wide to cover the case. The 69th section contains an enumeration of the different modes in which money paid into the Bank by a railway company may be applied. All these particulars are not repeated in extenso in sect. 80, which provides for the costs. This section, however, does make the costs of the orders for the payment out of Court of the principal monies payable by the company.

“There is a case before Shadwell, V.-C., in which it seems to have been held, that, although the petition was for the application of the money in restoring buildings which it was necessary to pull down in consequence of the operations of the company, costs were nevertheless payable by the company. The case is the stronger, because there the Court exercised the special power given by the 69th section, of applying the fund in replacing permanent buildings, and did not

(*g*) *Ex parte Earl of Hardwicke*, 17 L. J., Ch. 422; 12 Jur. 508; 1 De G., M. & G. 297; *In re Yates*, 12 Jur. 279. *Ex parte Corporation of Sheffield*, ante, p. 296.

(*h*) Cas. cit. *supra*, p. 300 et seq.

(*i*) *In re Bethlehem Hospital*, L. R., 19 Eq. 457; 44 L. J., Ch. 406; and the cases there cited.

(*k*) *Ex parte Milward*, 27 Beav. 571:

29 L. J., Ch. 245.

(*l*) 14 Jur. 1065.

(*m*) *Ex parte Incumbent of Whitfield*, 2 J. & Il. 610; *S. C.*, shortly and rather differently reported, 30 L. J., Ch. 816. See also *Re Vicar of Queen's Camel*, coram Kindersley, V.-C., 11 W. R. 508.

(*n*) But not with the costs of the Governors of Queen Anne's Bounty who had been served with the motion, and appeared

act under that portion of the clause which directs re-investments in land. There is an omission of any express provision in sect. 80 for the costs of applying money in renewing injured buildings, and it was only on the equity of the statute that the costs were allowed. It seems to follow a fortiori that the Court, taking the step which it is asked to take here, and treating the proposed application of the money as an investment in land, (which is within the words of sect. 80,) must follow the principle as to costs which was acted upon in that case.

“The costs would be payable by the company, if the money were actually laid out in land. The proposed building is, in my opinion, an investment authorized by the statute, and the case further falls within the words of sect. 80, ‘the costs of orders for the payment of principal out of Court.’ Having regard, therefore, to the fact that the object of the statute was to throw upon the company all the costs occasioned by taking land without the consent of the owner, and that very large words were introduced into the statute to supply the defects which had been found in analogous provisions of earlier acts, I am of opinion that the company must pay the costs of the petition and of the payment out of the money.”

The fees payable to the architect and surveyor for planning and superintending buildings are not costs and charges incidental to the investment in the buildings, so as to be payable by the company (o).

Architect's and  
surveyor's fees.

Where the lands, &c., purchased are “conveyed, limited and settled upon the like uses, trusts and purposes, and in the same manner as the lands in respect of which the money was paid stood settled,” under sect. 69, it is held that, upon the equity of the statute, the company are liable to pay the costs of such re-settlement.

Costs of re-  
settlement.

And in a case in which at the time of the purchase by a railway company, and when the purchase-money was paid into Court, the uses of the land sold were different from those subsisting at the time of the application for re-investment, Kindersley, V.-C., refused to make the company pay the costs of the re-investment, but, upon appeal, the Lords Justices varied the order and threw the costs on the company (p).

With regard to the appearance of mortgagees or annuitants, whose rights are not affected by the petition, it has been recently laid down that the proper course is to serve them with a copy of the petition and to pay them 40s. for costs, with an intimation that if they appear, they will probably have to pay their own costs (q). And this rule applies whether the petitioners be life tenants or absolutely entitled (r). Where lands have been purchased by two different companies, and the fund in Court is consequently made up of two items, it is in the discretion of the Court whether the costs of two petitions are to be allowed (s).

(o) *Butchers' Company, In re*, 53 L. T. 491.

(p) *Re De Beauvoir*, 29 L. J., Ch. 587;  
2 De G., F. & J. 5.

(q) *Re Gore Langton's Estates*, L. R.,

10 Ch. 328; 44 L. J., Ch. 405; 32 L. T. 785.

(r) *Re Harstead United Charities*, L. R.,  
20 Eq. 48.

(s) *Re Gore Langton's Estate*, ubi sup.

2. *Costs of Investment.*

Where two petitions were presented by the same petitioners, whose title was derived partly from a will and partly from a settlement, and who made the trustees of the will parties to one petition, and the trustees of the settlement parties to the other, it was held that one petition only ought to have been presented, and the company were ordered to pay the costs of the first petition, five guineas towards the petitioner's costs of the second petition, and three guineas towards the costs of each set of trustees (l).

Where two funds have been dealt with by different branches of the Court, and it is desired to deal with both together, leave can be obtained to present one petition without transferring either of the matters (u).

Whether owner in fee can claim costs of re-investment.

It is believed, that it has never yet been decided whether an owner in fee can claim the costs of a re-investment. But Lord Justice Turner in one case (x) intimated an opinion that he could, and, in a subsequent case (y), Kindersley, V.-C., seemed disposed to follow that intimation. But in neither of those cases was it necessary to decide the point. Such costs seem clearly within the words of sect. 80 (z).

Payment of principal money out of Court.

Thirdly, as to the sixth of the above divisions, viz., as to the costs of the payment out of Court of the principal monies. The act seems in all cases to throw these costs upon the company, in what manner soever the money may be applied when paid out, except where there is litigation between adverse claimants. An important case on this subject is *Haynes v. Burton* (a), in which it was held by Kindersley, V.-C., after a review of numerous cases, that when the lands are the subject of a suit, the parties to the suit should be served with notice of the application for payment out of Court, and the costs of service and appearance must be borne by the company.

Where there are adverse claimants.

Where the money is placed to the account of the Accountant-General in the cause only the company cannot be made to pay the

(l) *Pattison's Estates*, in re, L. R., 4 Ch. D. 207.

(u) *In re Lord Arden's Estates*, L. R., 10 Ch. 145.

(x) *Re De Beauvoir*, ubi supra.

(y) *Re Pick*, 31 L. J., Ch. 495.

(z) See *Re Dodd's Estate*, 21 L. T. 512; 19 W. R. 741.

(a) 30 L. J., Ch. 804; 1 Dr. & Sm. 483. See the judgment of Kindersley, V.-C., at length in the two prior editions of this work. See also *S. C.*, 35 L. J., Ch. 233; *Henniker v. Chaffy*, 28 Beav. 621; *Re L. and S. W. L. Co.*, 2 J. & H. 390; *S. C.* reversed, 11 W. R. 54; *Brandon v. Brandon*, 32 L. J., Ch. 20; *Re Braye*, 32

L. J., Ch. 432; *Re Long*, 33 L. J., Ch. 620; *Re Bower*, 33 L. J., Ch. 711; *Re Cooper*, 34 L. J., Ch. 373. As to costs of part owners, *Re Nicholls*, 35 L. J., Ch. 516. As to the practice with regard to costs under the corresponding provisions in special acts (which generally are more limited than sect. 80), see *In re Harrison's Estate*, L. R., 10 Eq. 532; 40 L. J., Ch. 77; *In re Williams' Estate*, L. R., 12 Eq. 488; *In re Charity Schools of St. Dunstan in the West*, L. R., 12 Eq. 537; *In re Lord Stanley of Alderley's Estate*, L. R. 14 Eq. 227; *In re Spitalfields Schools*, L. R., 10 Eq. 671, and the decisions referred to in these cases.

costs (b), and ought not to be served with the petition, or the petitioner will have to pay their costs (c).

Where one of several persons applies for an aliquot share of purchase-money paid into Court, it is not necessary to serve the other parties entitled with notice of the application (d), and if they appear the company are not liable to pay costs of appearance (e). Nor, in fact, is it "adverse litigation," where there is a contest between two parties as to the proportion in which a fund is to be divided between them (f), as where an inquiry has to be taken as to the amount due on a mortgage being paid off, to mortgagor and mortgagee respectively (g). But the company are not liable to costs of mortgages proving incumbrances made after payment of the fund into Court (h). The company are liable to pay the costs of infants who, having attained their majority, petition to have the fund in Court paid to them (i). Where an order for costs omitted the usual words, "excepting costs of adverse litigation," the Lords Justices ordered their insertion (k).

Where a petition is presented for payment either to or with consent of incumbrancers, the only costs which the company can be required to pay in addition to the petitioners' costs, are £2 2s. for the incumbrancers' costs, and the costs of an affidavit of service on the incumbrancers (l). Costs incurred by mortgagees, who have mortgaged their interest in a fund after its payment into Court, in proving their incumbrances are not payable by the company (m).

Where a fund in Court had not been dealt with for fifteen years, and it became necessary, in compliance with the Chancery Funds Rules, to serve the official solicitor with the petition for payment out, it was held that his costs were not payable by the company (n).

The company will be ordered to pay the costs of an investment under sect. 32 of the Settled Land Act, 1882 (o), although an investment under that section, *e.g.*, in railway debenture stock,

Costs of one of several persons.

Costs of administration.

Costs of infants.

Costs of litigation.

Costs of incumbrancers.

Costs of official solicitor.

Costs of investment under Settled Land Act.

(b) *Brown v. Fenwick*, 35 L. J., Ch. 241.

(c) *Prescott v. Wood*, 37 L. J., Ch. 691.

(d) *Re Midland R. Co.*, 11 Jur. 1095.

(e) *Mulling v. Bird*, 22 L. J., Ch. 599; 17 Jur. 155.

(f) *Askew v. Woodward*, L. R., 14 Ch. D. 27 C. A., per Jessel, M. R.

(g) *Bureham, In re*, L. R., 17 Ch. D. 329. And see *Eden v. Thompson*, 2 H. & M. 9.

(h) *G. W. R. Co., Ex parte, Gough's Trusts, In re*, L. R., 24 Ch. D. 509; 49 L. T. 491.

(i) *Ex parte Slater*, 18 L. J., Ch. 431.

(k) *Re Cunt's Estate*, 6 Jur. N. S. 183; 1 De G., F. & J. 153; 29 L. J., Ch. 119.

The words "such as are occasioned by litigation between adverse claimants" refer to costs, not proceedings. As to introduction into petition of costs occasioned by copies of sections of special acts, see *Ex parte Lilley*, 19 L. J., Ch. 329, and *Re Manchester R. Co., Ex parte Oswaldston*, 8 Hare, 31.

(l) *Artizans, &c., Act, Re, Jones, Ex parte*, L. R., 14 Ch. D. 625; *Halstead United Charities, Re*, L. R., 20 Eq. 48.

(m) *Great Western R. Co., Ex parte, Gough's Trusts, In re*, L. R., 24 Ch. D. 509.

(n) *Clarke's Estates, In re*, L. R., 21 Ch. D. 776; 52 L. J., Ch. 88, per Kay, J.

(o) See p. 306, *ante*.

2. *Costs of Investment.*

may be more expensive than an investment under the Lands Clauses Act (p).

3. *Whether Money deposited is Real or Personal Estate.*

3. *Whether Money deposited is to be treated as Real or Personal Estate.*

An important question has been discussed, upon which the authorities are not perhaps quite uniform, as to whether money deposited by companies who have taken or purchased lands, under the compulsory powers of their acts, is to be treated as money, or personal estate impressed with the trusts of real estate—money-land as it is sometimes called.

Under sect. 76, personally.

The only principle deducible from the cases is, that where the matter comes under sect. 69 of the Lands Clauses Act, the money remains impressed with the character of real estate; and when it comes under sect. 76, the money goes as personalty (q). In *Cross's case* (r), before Lord Cranworth, V.-C., where the determination was that it came under sect. 76, it was decided, that money deposited for the purchase of freehold land taken under the Lands Clauses Act from an owner who was in a state of mental imbecility, and who continued in that state until his death, but who was not the subject of a commission of lunacy, could not after his death be considered as subject to the trusts of a will made before he became incompetent, and whereby he had devised his real estates, but that his executors were entitled to it, and an order was made accordingly.

Under sect. 69, realty.

But in another case (s) where real estate, settled on marriage upon trusts for sale, on the request of husband and wife, or the survivor, was taken by the corporation of London under the compulsory powers in the London Bridge Acts, without any conveyance by the trustees, and the value of the land was assessed by a jury and paid into Court, and, on petition of the trustees, invested in consols, upon the trusts of the settlement,—Turner, V.-C., decided, that, under these circumstances, there was no conversion of the real estate into personalty, the case being under sect. 69.

*Re Walker.*

So where a landowner (t), having land within the limits of deviation, entered into an agreement with a company, that in case they should construct their railway under their act, they should pay him a

(p) *Hanbury's Trusts, In re*, 52 L. J., Ch. 637; 30 W. R. 781.

(q) *Re Harrop*, 26 L. J., Ch. 516. And see *Re Bayot*, 31 L. J., Ch. 772; *Ex parte Hardy*, 30 Beav. 206.

(r) *Re East Lancashire R. Co.*, 1 Sim., N. S. 980; and see *Ex parte Haulins &*

*Railw. Cas.* 505, n. (u).

(s) *Re Taylor*, 9 Hare, 598; 20 L. J., Ch. 142; and see *Mulland Countess R. Co. v. Oswin*, 3 Railw. Cas. 497.

(t) *Re Walker*, 22 L. J., Ch. 888; 1 Drew. 508.

certain sum per acre for such of his land as they should require; and after his death the company took five acres of his land, and paid the purchase-money into Court, and the devisee of the estate on which the railway had been constructed, having petitioned to have the money paid to him, the petition being opposed by the executors, Kindersley, V.-C., decided that the case was under sect. 69, and the contract did not operate as a conversion of the purchase-money into personal estate, but it formed a portion of the testator's real estate at the time of his death, and continued to retain that character afterwards. His Honor said,—

“Without adverting to the other points which have been discussed, or referring to the decisions in the earlier cases, which, I must be permitted to say, are most unsatisfactory (u); but, assuming that I should be obliged to follow them in a similar case, still this does not seem to me to come within the authorities cited. The real meaning of the contract is this: that the company, having power to take the lands compulsorily from the owner at any time within the period allowed by the act, did not ask him to sell, but they wished to have the price defined, in case they required the property, and a sum per acre was fixed upon between the parties. Without using these precise words, it is evident that such was the meaning of the agreement. It referred to the fact that some of the land was included within the limits of deviation, but it was uncertain what portion would be required. If, however, the company did construct their line within the limits of deviation, and required any of the owner's land, they were to pay for it, at that rate per acre. The effect, therefore, was not that the owner contracted to sell, but that he gave the company permission to have the land at a specified price. It appears to me, upon these grounds, that the money which has been paid into Court does not constitute part of the personal estate of the testator, but formed a portion of his real estate at the time of his death, and continued to retain that character afterwards; and that it now belongs to the parties entitled to the real estate.”

Again (x), where lands settled on one for life, with remainder to her children, with remainder over to B. in default of children, in fee, were taken under the authority of a Railway Act, which contained the usual compulsory clauses, and the purchase-money was paid into Court, and invested in consols, and the dividends were ordered to be paid to the tenant for life, who afterwards died without children, and B. afterwards also died, having done no act in his lifetime showing any intention to treat the consols as personal estate: Stuart, V.-C., decided that the consols were to be treated as the real, and not as the personal, estate of B. His Honor said,—

“In support of the argument that the property had been converted into personal estate, *Cross's case* (y) has been cited, and I must say, that, although that

(u) Referring to the before mentioned, and other cases.

(v) *Re Stewart*, 22 L. J., Ch. 360. And

see *Re Horner's Trusts*, *ibid.* 369; 7 Railw. Cas. 373.

(y) Ante, note (7).

8. Whether Money  
deposited in Real  
or Personal Estate

case does not go to the whole extent of the principle here contended for, it does countenance the argument. Against that authority, other cases have been cited; and to the principle of these decisions I entirely accede. I think that where money has been paid into Court, by reason of real estate having been taken under the compulsory powers of one of these acts, and remains in Court, it is to be considered as money or personal estate in the hands of this Court, impressed with the trusts of real estate. That is a sound principle; and there must be strong words in the act to induce the Court to act on the assumption that it is personalty. Therefore it seems to me clear, upon authority and principle, that the money in Court in this case is to be considered, for the purpose of the question as to who was entitled to it, as real estate" (c).

Infant.

It is settled that the purchase-money of land of which an infant was seised in fee remains impressed with the character of real estate, and on the death of the infant descends to his heir-at-law (a), and the same principles were held to apply to the purchase-money of land belonging to a felon (b).

Felon.

Disentailing  
deed.

It appears to be still unsettled whether it is necessary in the case of entailed land that a disentailing deed should be executed before the money is paid out of Court. There have been numerous conflicting decisions on this point, both in England and Ireland (c); the later and preponderating authority being in favour requiring the disentailing deed (d).

(c) See also on this subject, *Haynes v. Haynes*, 30 L. J., Ch. 578.

(a) *Killam v. Fielldon*, L. R., 6 Ch. D. 491.

(b) *Re Harrop*, 26 L. J., Ch. 510. Forfeiture for felony is now abolished, by 33 & 34 Vict. c. 23.

(c) *Re Great Southern and Western R. Co.*, 9 Ir. Eq. R. 482; *Re Vandrey*, 3 Oill. 224; 30 L. J., Ch. 885. *Re South Eastern R. Co.*, 30 Beav. 215; *Nolley v. Palmer*, L. R., 1 Eq. 211; *Re Watson*, 10 Jur. N. S. 1011. *Re Holden*, 1 H. & M. 376. *Re Butler's Will*, L. R., 16 Eq. 479. *Re How*, L. R., 17 Eq. 300, citing *Dan. Ch.*

*Pr.* 5th ed., p. 1656. *Re Reynolds*, L. R., 3 Ch. D. 61, in which Mellish and James, L.JJ., followed *Re Butler's Will*. *Re Tylden's Trust*, 9 Jur., N. S. 912; 8 L. T. 681; 11 W. R. 869. *Re Norrop's Will*, 31 L. T. 85. *In re Wool's Settled Estates*, L. R., 20 Eq. 372. *In re Broadwood's Settled Estates*, L. R., 1 Ch. D. 438. *Ex parte Munson*, L. R., 2 Eq. 82. *Re Limerick and Ennis R. Co.*, *Ex parte Smyth*, L. R., 10 Eq. 66, and see the other decisions referred to in the above cases.

(d) *Re Reynolds*, *In re*, L. R., 3 Ch. D. 61, per Mellish and James, L.JJ.

## CHAPTER VIII.

ON THE TITLE TO LANDS PURCHASED AND THE SALE OF  
SUPERFLUOUS LAND.

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1. *The Conveyance of Lands purchased.*1. *Conveyance.*

When lands are purchased by the company by agreement, or are taken under the compulsory powers contained in the special act, the owner or other party entitled to sell is required to make out a good title; and it is usual to deliver an abstract of the title to the company (a), as in the case of an ordinary sale of lands. The owner is also required to execute a conveyance to the company. Where the price to be paid for the land has been fixed by an award, no action can be maintained upon such award until a conveyance of the land has been executed (b). We have already seen\* that the Lands Clauses Act provides for the inconvenience which would result by the neglect or inability of the party to perfect the title and make the conveyance, by authorizing the company to execute a deed-poll, whereupon, in certain cases, the lands vest absolutely in the company, without any further act being done by the vendor.

Vendor delivers an abstract of the title.

\* Page 303.

Special provisions are also inserted, to enable the company to take a conveyance of copyholds, common lands, waste lands, and lands in mortgage; and also to release lands from existing charges. As to

Provisions for releasing lands from incumbrances.  
Copyholds.

(a) It seems to be the practice of railway companies to be satisfied with a good holding title. So it was stated in evidence given before the Lords' Committee on Compensation, 1845. Where a company purchased land from a municipal corporation and made their railway over it, and a dispute afterwards arose as to the title to the land, but the corporation obtained a verdict on an ejectment, as it was alleged, by surprise, and the company, under the pressure of the judgment, and to retain possession of the land, paid the purchase-money to the corporation, Sir J. Romilly,

M. R., upon a representation that the title to the land was really in dispute, and being of opinion that, as the vendors were trustees, the money ought originally to have been paid into Court under the 69th section of the Lands Clauses Act, ordered the corporation to bring the money into Court, whilst the rights of the parties were under discussion. *North Western R. Co. v. Corporation of Lancaster*, 16 Jur. 677.

(b) *East London Union v. Metropolitan R. Co.*, L. R., 4 Ex. 309; 38 L. J., Ex. 225.



1. *Conveyance.* lands of copyhold or customary tenure (c) it is provided by the Lands Clauses Act, sect. 95, that every conveyance of such lands to the company shall be entered on the rolls of the manor, and on payment to the steward of the manor of such fees as would be due to him on the surrender of the same lands to the use of a purchaser thereof (d), he shall make such enrolment; and every such conveyance, when so enrolled, shall have the like effect, in respect of such copyhold or customary lands, as if the same had been of freehold tenure; but that until the lands have been enfranchised, they continue subject to the same fines (e), rents, heriots and services as were theretofore payable. And by sect. 96 the company are required, within a certain period afterwards, to procure the lands to be enfranchised by the lord of the manor, to whom they are to pay compensation, to be assessed according to the mode prescribed, for the enfranchisement (f). The lands, when enfranchised, are to be held in free and common socage; and if the lord fails to enfranchise the lands, the company may execute a deed-poll, in the manner provided in the case of a purchase of lands:† (Sect. 97.) Rents payable in respect of copyhold lands may, in certain cases, be apportioned in the manner prescribed: (Sect. 98.)

As to common and waste lands, it is provided, that compensation in respect of the right in the soil shall be paid by the company to the lord of the manor: (Sect. 99.) And, upon payment or deposit thereof in the Bank, a conveyance from the lord of the manor to the company will operate as if he had been seised in fee simple; and in default of such conveyance the company may execute a deed-poll, in the manner provided in the case of a purchase of lands: (Sect. 100.) The compensation to be paid to the commoners is determined by agreement made between the company and a committee of commoners: (Sect. 101.) The members of such committee are not to exceed five in number, chosen by the commoners at a meeting, con-

(c) Where the lord of a manor was held not to be affected by a sale of copyhold lands, made to a company by his tenant in fee, see *Dimes v. Grand Junction Canal Co.*, 9 Q. B. 489, in error.

(d) It has been contended, that by this provision the steward of the manor is entitled to demand a fee for a surrender, and another fee for admittance, inasmuch as the parliamentary conveyance operates as both a surrender and admittance, and that it would be unjust to oblige the steward, for one fee, to perform an act which, under ordinary circumstances, would entitle him to demand two, but the Court of Exchequer decided that only one fee is payable. *Cooper v. Norfolk R. Co.*, 8 Exch. 548; 13 Jur. 195; 6 Railw. Cas. 94.

(e) The lord is not entitled to any fine

upon the execution of a conveyance to a railway company under this section, nor to any compensation for the loss thereof. *Ecclesiastical Commissioners v. London and South Western R. Co.*, 14 C. B. 743. The provisions of the Copyhold Enfranchisement Acts, 1852, 1858 (15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94), do not apply to the purchase of copyholds by a railway company under the Lands Clauses Act, so as to entitle a tenant for life of the manor, as against a remainderman, to part of the monies paid into Court by the company, as representing fines payable by tenants as a condition of compulsory enfranchisement. *Re Sir T. M. Wilson*, 32 L. J., Ch. 191.

(f) See *Ecclesiastical Commissioners v. L. & S. W. R. Co.*, *ubi supra*.

Conveyance of copyholds, steward's fees.

Enfranchisement of copyholds.

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Common and waste lands. Sects. 99-107.

venued by the company by public advertisement and notice : (Sects. 102, 103.) The committee may then agree with the company, as to compensation for the extinction of the commonable rights ; and the committee receive the amount, and apportion it among the commoners (*g*) : (Sect. 104.) If the committee and the company cannot agree, the compensation is determined as in other cases of disputed compensation (Sect. 105) ; or, if no committee be appointed, then by a surveyor, to be appointed by two justices : (Sect. 106.) Upon payment or deposit of the money agreed upon or determined for compensation, the company may execute a deed-poll, in the manner provided in the case of a purchase of lands, and thereupon the lands vest in the company, discharged from all commonable and other rights : (Sect. 107.)

It has been held under the above sections, that if the railway be constructed without compensation having been paid to commoners, in such case any commoner may sue the company for disturbance of his rights of common, and is not confined to proceedings for compensation. This is because it is a condition precedent to the right of the company to disturb the commoners, that the company should first assess and pay the valuation either to the commoners or into the Bank (*h*). But the sections are not imperative so as to preclude the enforcement, by decree for specific performance, of an agreement entered into otherwise than as mentioned in the statute (*i*).

Action by commoner for disturbance.

To relieve lands taken by the company from being encumbered by existing mortgages (*k*), the company are empowered to pay off all mortgages affecting lands, upon giving notice to the mortgagee, or paying six months' additional interest ; and the mortgagee must then convey his interest in the lands to the company : (Sect. 108.) If the mortgagee fails to convey the lands, or to adduce a good title, the company may deposit the monies in the Bank, and execute a deed-poll in the manner provided in the case of a purchase of lands, and all the interest of the mortgagee thereupon vests in the company : (Sect. 109.) If the mortgaged lands are of less value than the mortgage debt, a provision is made for ascertaining the amount of com-

Lands in mortgage.  
L. G. Act, ss. 108-114.

(*g*) If the majority of the committee are of opinion that these provisions for apportionment cannot be satisfactorily carried out, they may apply to the inclosure commissioners under 17 & 18 Vict. c. 97, ss. 15-20, post, vol. II. Where compensation money for commonable rights was paid into Court, Wood, V.-C., held that it ought to be re-invested in land upon the same trusts. *Nash v. Coombs*, 37 L. J., Ch. 600.

As to respective rights of the lord of the manor and occupiers of cottages for whom he was trustee of certain turf common, see

*Christchurch Inclosure Act, In re*, L. R., 35 Ch. D. 355.

(*h*) *Stoneham v. London, Brighton and South Coast R. Co.*, L. R., 7 Q. B. 1 ; 41 L. J., Q. B. 1.

(*i*) *Bee v. Stafford and Uttoxeter R. Co.*, 23 W. R. 863.

(*k*) When the company should give notice to the mortgagee to treat for the lands, see ante, p. 192. As to equitable mortgages, see *Martin v. London, Chatham and Dover R. Co.*, 35 L. J., Ch. 795 ; L. R., 1 Eq. 145 ; L. R., 1 Ch. 501.

1. Compensation.

compensation: (Sect. 110.) A provision is also made for completing the title of the company, without affecting the remedies possessed by the mortgagee, under the mortgage deed, against the mortgagor: (Sect. 111.) In like manner, provision is made for ascertaining the compensation, and completing the title of the company, where a part only of the mortgaged lands is taken, and the mortgagee does not consider the remaining part sufficient security<sup>(l)</sup>: (Sects. 112, 113.) If a mortgagee is compelled to accept his money, at an earlier period than the time limited in the mortgage deed, he is entitled to be paid the costs of re-investing the money, and also compensation for any loss he may sustain by the re-investment<sup>(m)</sup>: (Sect. 114.)

Rent-charges.  
Sect. 115.

Where lands are subject to rent-charges, it is provided, that differences respecting the consideration to be paid for releasing them from such charges are to be determined as in other cases of disputed compensation: (Sect. 115.) If only a part of the lands charged be required, then such part may be released, by agreement between the owner of the lands and the party entitled to the rent-charge on the one part, and the company on the other part: otherwise by two justices: but if the remaining lands are a sufficient security, then, by consent, such remaining lands may be made subject to the whole charge: (Sect. 116.) If the party entitled to the rent-charge fails to release it, or to make a good title, the company may deposit the compensation money in the Bank, and execute a deed-poll in the manner provided in the case of a purchase of lands: and thereupon the rent-charge becomes extinguished: (Sect. 117.) If the lands released were subject to the charge, jointly with other lands, such other lands remain liable for the whole, or the remainder of the charge, as the case may be; and the company may affix their common seal to the instrument which created the charge, stating the facts; and such memorandum is made evidence: (Sect. 118.)

Leases for years.  
Sect. 119.

If lands are comprised in a lease for years unexpired, and a part only of such lands is required by the company, the rent of the remaining portion is to be apportioned by agreement, or by two justices; and after such apportionment, the lessee is liable only for the rent so apportioned<sup>(n)</sup>: (Sect. 119.)

The purchase of land by a railway company under the compulsory powers, discharges the vendor from a covenant in a lease that neither he nor his assigns will build on such land<sup>(o)</sup>. Where a railway

(l) Where the person in possession claimed under an old mortgage, but with a possessory title, it was held that sect. 112 did not apply. *Re Cook*, 8 L. T. 759.

(m) The Court will restrain a company, by injunction, from proceeding with works, until this is paid. *Rancken v. East and*

*West India Docks R. Co.*, 12 Beav. 208; 19 L. J., Ch. 153.

(n) As to compensation to tenants, see ante, p. 243.

(o) *Baily v. De Crespigny*, L. R., 4 Q. B. 180; 38 L. J., Q. B. 98; 10 B. & S. 1.

company had given the lessee notice to treat, and an award had been made, and afterwards a conveyance executed and possession given up to the company, it was held that the lessee's liability on a covenant to repair and keep in repair did not cease until the execution of the conveyance and giving up of possession (p).

With respect to the form of the conveyance, the statute provides that conveyances of lands to be purchased may be according to the form in the schedules (A. and B.) (q) to the act annexed (which form, under the words "rights, members and appurtenances," passes a right of way (r)), or as near thereto as the circumstances of the case will admit, or by deed in any other form which the company may think fit (s). All conveyances so made are effectual to vest the lands thereby conveyed in the company, and operate to merge all terms of years attendant by express declaration, or by construction of law, on the estate conveyed, and to bar all estates tail, and all other estates, remainders, reversions, trusts and interests whatsoever in the lands comprised in such conveyances, which shall have been purchased or compensated for, by the consideration therein mentioned: (Sect. 81.)

Form of conveyance.  
L. C. Act, s. 81.

Effect of conveyance.

It was held by Malins, V.-C., in *Norton v. L. & N. W. R. Co.* (t), that a railway company has not the right, such as an ordinary proprietor in fee simple has, to erect hoardings to prevent prescriptive rights being acquired for windows looking across the line; but the Court of Appeal did not think it necessary or desirable to determine so difficult and important a question.

Power to prevent prescriptive rights being acquired by adjoining owner.

If the company, after giving notice to treat to a second incumbrancer, ultimately purchase from a prior incumbrancer, who has a power of sale, the second incumbrancer is not entitled to have his incumbrance discharged by the company, nor to compel the company to proceed upon their notice to treat (u).

Two incumbrances.

The costs of all such conveyances are to be borne by the company, and such costs include all charges and expenses incurred, on the part

Costs of conveyance.  
Sect. 82.

(p) *Mills v. The Guardians of the East London Union*, L. R., 8 C. P. 79; 42 L. J., C. P. 46; 27 L. T. 557. In this case the execution of the conveyance and the giving up of possession, took place on the same day.

(q) See these forms, post, Vol. II. Some useful observations on the use of these statutory forms may be seen in Messrs. Frend and Ware's *Railway Precedents*, 2nd ed. A.D. 1886, p. 122.

(r) *Bailey v. Great Western R. Co.*, L. R., 26 Ch. D. 434; 51 L. T. 337—C. A.

(s) This deed must be stamped with the stamp duty which would have been payable upon a conveyance of the land. Railway companies will probably be advised,

in all cases which fall under the purview of the 77th section, to perfect their title, by executing a deed-poll in pursuance of the statute. It seems to have been the intention of the Legislature (probably with a view to the Stamp Acts) to require a conveyance in all cases.

(t) L. R., 19 Ch. D. 268.

(u) *Hill v. Great Northern R. Co.*, 23 L. J., Ch. 524, reversing *Kindersley*, V.-C., ib. 20. When the interest on the monies deposited ceases to run, in favour of the vendor of the lands, see *Ex parte Earl of Harwich*, 1 De G., M. & G. 297; *De Visser v. De l'Isle*, 1 Macn. & G. 336; 19 L. J., Ch. 52; *Lewis v. South Wales R. Co.*, 22 L. J., Ch. 209.

1. *Conveyance.*

as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interests therein, and of deducing, evidencing and verifying the title to such lands, terms or interests, and of making out and furnishing such abstracts and attested copies as the company may require, and all other reasonable expenses incident to the investigation, deduction and verification of such title (*x*): (Sect. 82.)

## Taxation of costs.

If the company and the party entitled to any of the above costs do not agree as to the amount, the costs may be taxed (*y*) by one of the Taxing Masters of the Chancery Division of the High Court, or by a Master in Chancery in Ireland, upon an order of the Court; and the company are required to pay what the Master shall certify to be due, or, in default, the same may be recovered in the same way as any other costs payable under an order of the Court, or the same may be recovered by distress, in the manner provided in the act; and the expense of taxing such costs is to be borne by the company, unless, upon the taxation, one-sixth part of the amount be disallowed, in which case the costs of taxation are to be borne by the party whose costs are taxed: (Sect. 83.) This taxation must be before payment, and cannot be made after payment of the costs (*z*).

## When the company are not liable to the costs of making the title.

In a case decided before the passing of the Consolidation Act, where a landowner contracted with a railway company to sell them a certain portion of his land, and the landowner died, and the legal estate in the lands descended to infants, it was ruled, that, as the vendor had suffered the legal estate in the lands to descend to the infants, and had thereby occasioned the necessity of a suit, in order to procure a conveyance of the legal estate, the costs of the suit ought to be defrayed out of the purchase-money (*a*).

Costs of title.  
*Re Liverpool Improvement Co.*

So, where the trustee of a copyhold estate died, leaving an infant his heir, and the *cestui que trust* agreed to sell a part of the estate to a company for the purposes of a railway act, and, to complete the title, it became necessary to take proceedings under the Trustee Act, 1 Will. IV. c. 60, to get a surrender from a person appointed in the place of the infant, and the Taxing Master having allowed all the

(*x*) But not including the costs (as of a surveyor) of ascertaining the thing to be conveyed. *Re Hampstead Junction R. Co.*, 33 L. J., Ch. 79. See *Re Spooner*, 1 K. & J. 220. As to selling out part of a fund in Court to pay conveyancing costs where a company had become insolvent, see *Re Glebe Lands of Great Yeldham*, L. R., 9 Eq. 68.

(*y*) If the lands are purchased under a special agreement made between the parties, quære whether the costs may be taxed. *Ex parte Great Western R. Co.*, 8 Railw. Cas. 516. The Master has no

power to tax the costs of tenants or persons not conveying. *Marquis of Drogheda v. Great Southern and Western R. Co.*, 12 Ir. Eq. Rep. 103.

(*z*) *South Eastern R. Co., Ex re, Somerville, Ex parte*, L. R., 23 Ch. D. 167; 52 L. J., Ch. 438; 48 L. T. 416; 31 W. R. 518, per Fry, J.

(*a*) *Midland Counties R. Co. v. Westcomb*, 2 Railw. Cas. 211; *Same v. Caldecott*, ib. 394; see also *Ex parte Ommamey*, 10 Sim. 298; *Farrer v. Lord Winterton*, 4 Y. & Coll. 472; *Eastern Counties R. Co. v. Triffnell*, 3 Railw. Cas. 133.

costs of the proceedings, as against the company, Sir J. Romilly, M. R., decided, that these costs ought not to have been allowed (*b*). But in a subsequent case (*c*), the same learned judge said, that his decision in *Re South Wales Co.* seemed to be erroneous, and overruled it, holding the company liable to the costs of taking out letters of administration de bonis non to a deceased owner, which were necessary to perfect the legal title.

2. *Interests in Lands omitted to be purchased through Mistake or Inadvertence.*

2. *Interests omitted to be purchased.*

The following provisions are made by the Lands Clauses Act, with respect to interests in lands which have, by mistake or inadvertence, been omitted to be purchased:—

By sect. 124, if at any time after the company have entered upon any lands which they were authorized to purchase, and which they permanently require, any party appear to be entitled to any estate, right or interest in or charge affecting such lands, which the company through mistake or inadvertence, have failed to purchase or pay compensation for, the company may remain in undisturbed possession, provided that,—within six months after notice of such estate, &c. in case the same be not disputed by the company, or, in case the same be disputed, then within six months after the right thereto is established by law in favour of the party claiming the same,—the company purchase or pay compensation for the same, and also pay to any party, who may establish a right thereto, full compensation for mesne profits which would have accrued during the interval between the entry of the company and the time of the payment of the purchase-money or compensation. Unless the company can bring themselves clearly within the terms of this section, as having omitted to purchase the land “through mistake or inadvertence,” they are liable to be restrained from running their trains over the land (*d*).

Power to purchase interests omitted to be purchased by mistake.  
L. U. Act, s. 124.

Mesne profits.

By sect. 125, in estimating the compensation, or mesne profits, the jury, or arbitrators, or justices (as the case may be), must assess the same, according to what they find to have been the value of the

How value of such land, to be estimated.  
Sect. 125.

(*b*) *Re South Wales R. Co.*, 14 Beav. 418; 15 Jur. 1145; 20 L. J., Ch. 534.

(*c*) *Re Liverpool Improvement Act*, 1864, 37 L. J., Ch. 376; L. R., 5 Eq. 282.

(*d*) *Stretton v. Great Western and Brentford R. Co.*, L. R., 5 Ch. 751: re-

versing decision of Malins, V.-C., *ib.* 754, n. See also *Martin v. London, Utham and Dover R. Co.*, L. R., 1 Ch. 501 (reversing a decision of Stuart, V.-C.), in which the company having notice of an equitable mortgage, the equitable mortgagees were held entitled to a lien.

2 *Interests omitted to be Purchased.*

lands, estate, or interest and profits, at the time such lands were entered upon by the company, without regard to any improvements or works made in the lands by the company, and as though the works had not been constructed.

Company to pay the costs of litigation as to such lands.  
Sect. 126.

By sect. 126, in addition to the purchase-money, and before the company become absolutely entitled to the estate, interest or charge released to them, they must, when the right thereto has been disputed by and determined against them, pay the full costs and expenses (e) of any action for the determination of such right to the parties with whom the litigation took place. Such costs and expenses, if disputed, are to be settled by the proper officer of the Court.

If title disputed  
ejectment lies.

It has been held that the effect of sect. 124 is, that if the company dispute the title of the claimant an action of ejectment may be brought, but the Court will stay execution till six months after the title of the claimant is established (f). But if the company do not dispute the title (and asking for delay to consult legal advisers does not amount to disputing the title), an ejectment cannot be brought for six months after notice of the claim (g), that is, after production of the abstract of title (h). This was decided in *Jolly v. Wimbledon and Dorking R. Co.*, in the Exchequer Chamber, when Erle, C. J., in delivering judgment, said,—

*Jolly v. Wimbledon and Dorking R. Co.*

“The statute provides for taking the land under every modification of interest and for the making of compensation in respect of every lawful claim; and it has been uniformly held, that wherever compensation is provided under the statute in respect of any claim, there the common-law remedies in respect of that claim are suspended or taken away. By the sections preceding the 124th, provisions are made in respect of interests known when the lands are taken. The taking is made lawful to the company, the compensation is secured to the owner, and the ordinary remedies at law for the taking alleged to be wrongful are taken away. Then follows sect. 124, with respect to interests in lands which have been already taken, and which interests by mistake have been omitted to be purchased. The intention of the section, by analogy with what has preceded, would be to give the same protection against actions in respect of those interests as had been before given in respect of other interests in land. The words are,—‘the company shall remain in undisturbed possession, if they duly compensate.’ These words express that the possession not only is then lawful, but has been and shall continue so if the condition is performed. It is very reasonable that a company, giving all parliamentary publicity with plans and books of reference, should have security from litigation for their works under their statute. It is expressly given in respect of all possible known interests, and it seems unreasonable to suppose that an unknown interest should be alone intended to have the privilege of bringing an

(e) This means costs as between solicitor and client. *Doe d. Hyde v. Mayor of Manchester*, 12 C. B. 474.

(f) *Marquis of Salisbury v. Great Northern R. Co.*, 28 L. J., Q. P. 40; 5

C. B., N. S. 174.

(g) *Jolly v. Wimbledon and Dorking R. Co.*, 31 L. J., Q. B. 95; 1 B. & S. 81f

(h) Per Erle, C. J., *infra*.

action against the company, together with a right to compensation under the statute. If, during the parliamentary inquiry, and the company's treaty with the mortgagor, and the laying down of the railway on the lands, the mortgagee kept his mortgage unknown, the company ought to have time to inquire after notice of the claim, that is, after production of the abstract of title. The claim may be unfounded or fraudulent, or it may involve claims of other parties. The necessity for time and caution is shown by *Hyde v. Mayor of Manchester* (i), for there the company had paid for the land in question to one proprietor, and had to pay for it again to Mr. Hyde, with all meane profits and costs, as between attorney and client, because the arbitrator had made a mistake in the boundary between two properties. Here the question of the validity of the deed, of its operation on five-sixths of the land, of deducting what is due to the mortgagee from the compensation to be paid to the mortgagor, and of deducting for the right of the lessee, if any should exist, must be considered before the compensation can be settled. If the possession of the company is lawful for six months after the title is produced, or the dispute determined, all rights and liabilities would be secured in good order, and this defence would prevail. On the other hand, if ejectment lies for every claimant of an unknown interest before he shows the ground of his claim and allows time for considering it, confusion and disorder will be introduced; for the company will have to decide whether they will suffer judgment by default and hazard the stay of execution upon a conflict of affidavits, or defend the cause with all the risks and imputations brought upon the present defendants for so doing; and also, if within six months compensation is made, any judgment that should have been obtained would thereby become futile. And then no provision is made in respect of costs, either to the claimant as between party and party, or as between attorney and client, or to the company in respect of useless litigation, which the claimant chooses to force them to, and all for no other purpose than securing some promptness in making compensation, about which litigation has probably increased, if not created, the delay. In the case of the *Marquis of Salisbury v. Great Northern R. Co.* (k), the title was shown and disputed, and ejectment was brought to try the title, and it was doubted whether it would lie for lands of which the possession was to be undisturbed; and it was held to be by implication given in the case where the title should be disputed, solely for the purpose of trying the title, execution being stayed as soon as that purpose should be effected. If the title is disputed, the section may be held to give by implication a right to resort to law, and, by limiting the right to the case of disputed title, all would be in order. But if it is given where there is no dispute of title, the confusion above described would follow. This judgment does not conflict with any opinion of the Court below, who considered that the point here was within *Lord Salisbury's case*, but, as above mentioned, that case appears to us to have no application to the present, because there the title was disputed,—here it is not."

In the following case the Court of Chancery refused an injunction to stay proceedings to assess compensation under sect. 124. The defendants, the owners of waterworks, solicited a bill in Parliament to extend their works, by constructing a reservoir upon the lands of the plaintiff and others. The plaintiff petitioned against the bill; but, upon an agreement, that the value of the land and the compensation should be settled by arbitration, and that the defendant should

Injunction to stay proceedings to assess compensation refused.

*Hyde v. Mayor of Manchester.*

(i) 5 De G. & S. 264.

(k) Ante, p. 323.



2 Interests  
omitted to be  
Purchased.

fix the exact quantity of the plaintiff's land required within six months after the bill should have passed, he withdrew his opposition, and the bill became an act. The act incorporated a former special act and the Lands Clauses Act, and empowered the defendants to take certain parts of the plaintiff's lands, according to the deposited plans. Prior to the expiration of the six months after the act had passed, the defendants gave the plaintiff notice, specifying the portions of his land that would be required, according to the boundaries in the plan and book of reference. The arbitration proceeded, and, after the expiration of six months, the plaintiff pointing out on the arbitration the inaccuracy in the boundaries, which attributed to the plaintiff's land less in admeasurement than he possessed, the arbitrator made his award, giving compensation for land described according to the plan and book of reference only; but it was in dispute whether he had included in his assessment of value the two roods and five perches which the plaintiff claimed beyond the admeasurement of the land comprised in the plan and book of reference. The defendants paid the amount awarded to the plaintiff. The defendants had made a statutory conveyance to themselves, by deed poll, describing the land according to the inaccurate plan and book of reference, and they took possession of the land. The plaintiff recovered the two roods and five perches, in an action of ejectment against the defendants (1). The defendants then proceeded (within six months after a motion for a new trial made by them had been refused), under the 124th section, to issue their warrant to the sheriff to summon a jury to ascertain the value of the land, and obtain the compulsory purchase of it from the plaintiff. The plaintiff filed a bill for an injunction restraining such proceedings, but Sir J. Parker, V.-C., refused it, saying,—

“The defendants must show, in order to bring themselves within the 124th section, that it *was* through mistake or inadvertence that they had failed or omitted duly to purchase or pay compensation for that land. It appears to me perfectly clear, not only that it was through mistake or inadvertence, but that it was through mistake or inadvertence into which they had been led by the imperfect information of the plaintiff himself, and the way in which he communicated it to them. It appears to me, therefore, that they are clearly within the position of being parties who have failed to purchase the land within proper time, through mistake or inadvertence. Then the plaintiff's counsel said, that might well be so, if the defendants were not bound by the special agreement; but that, by the agreement which they had entered into with the plaintiff to withdraw his opposition to the act, they were bound, within a certain time, to state what precise lands they wanted; that they were therefore not acting under the Lands Clauses Act, but were actually dealing with him on the footing of this agreement, and

(1) The proceedings on the judgment were afterwards stayed. *Doe d. Hyde v. Mayor of Manchester*, 12 C. B. 474.

are now trying to set up something against the agreement. But I do not think that is the true construction of the 124th clause, because the 124th clause provides for all cases in which the promoters of the undertaking shall have entered upon any land which they were authorized to purchase, if it appears that through mistake or inadvertence they failed or omitted duly to pay for it. It seems to me I have nothing to do with the mode in which they entered, or the contract under which they entered into possession of these lands; it is quite enough that the lands which they are in possession of are lands which they were authorized to purchase, and that they have not acquired a complete title to them, not from any fault of their own, but solely on account of mistake or inadvertence. It appears to me quite immaterial how, whether by the agreement or by the compulsory powers, or in what other way, they had got into possession of the land, if the circumstances are, that they are in that position, and that, through mistake or inadvertence, they failed to get a complete title. I therefore think they are within the 124th clause; and it seems to me they are within the time provided by the clause, because the clause gives them six months, after the right shall have been finally established at law. They are within six months from the time when the motion for a new trial was refused; and up to that time I think they were justified in saying, that, if they had not got a legal title, they had got at all events an equitable title. I am not satisfied, that at this moment they have not got an equitable title, which they might have enforced, as plaintiffs, against the former owner, and have compelled him to withdraw these proceedings, or to stay his proceedings in the action of ejectment. Therefore it appears to me, as far as can be determined upon an interlocutory motion, that the defendants are proceeding regularly and properly, under the 124th section; and that the plaintiff has no right to come here and interfere with them; and I must refuse the motion with costs" (n).

### 3. Sale of Superfluous Land.

#### 3. Sale of Superfluous Land.

With respect to lands acquired by railway companies under the Lands Clauses Act or their special act, or any act incorporated therewith, but which are not required for the purposes thereof, it is provided by the 127th section of the Lands Clauses Act, 1845 (n), that within the period prescribed for that purpose in the special act, or, if no period be prescribed, within 10 years after the expiration of the term limited by the special act for the completion of the works (o),

Lands not wanted to be sold, or in default to vest in owners of adjoining lands.  
L. C. Act, s. 127

(n) *Hyde v. Mayor of Manchester*, 5 De G. & S. 249; 16 Jur. 189; affirmed on appeal, 5 De G. & S. 264.

(n) By acts prior to the Lands Clauses Act, land not used for the special purposes reverted ipso facto to the original owner. Per Wood, V.-C., in *Ashty v. Manchester, Sheffield and Lincolnshire R. Co.*, 27 L. J., Ch. 301; 2 De G. & J. 453.

(o) As to the effect of an act extending the ten years, see *G. W. R. Co. v. May*, L. R., 7 H. L. 288, and post, where it was

held that the superfluous lands vested immediately on the expiration of the period prescribed by the act under which they were taken, and that the extension act did not suspend the vesting. See also *Moody v. Corbett*, ubi sup., and for the effect of a leasing act, *Tomin v. Budd*, L. R., 18 Eq. 368; 43 L. J., Ch. 627. The time may also be extended under a certificate from the Board of Trade under the Railway Companies Powers Act, 1864. See Ch. X. post.

S. Sale of Superfluous Land.

Lands to be offered to owners of lands from which they were originally taken or to adjoining owners.

Offer to be accepted within six weeks.

Differences as to price to be settled by arbitration.

the company shall absolutely (p) sell (q) and dispose of all such superfluous lands, and apply the purchase-money arising from such sales to the purposes of the special act (r). All superfluous lands remaining unsold at the expiration of such period thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same (s). But before the company dispose of any such superfluous lands, they must, unless such lands be situate *within a town, or be lands built upon or used for building purposes* (t), first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed (u), or if such person refuse to purchase the same, or cannot after diligent inquiry be found, then the like offer must be made to the person, or to the several persons, whose lands shall immediately adjoin the lands so proposed to be sold, such persons being capable of entering into a contract for the purchase of such lands. Where more than one person is entitled to the right of pre-emption, the offer must be made to such persons, in succession one after another, in such order as the company think fit : (Sect. 128.) If any such person be desirous of purchasing, then within 6 weeks after the offer for sale he must signify his desire to the company. If he decline the offer, or for six weeks neglect to signify his desire to purchase, the right of pre-emption ceases; and a declaration in writing made before a justice by some person not interested in the matter of the offer and refusal, &c. is in all courts sufficient evidence : (Sect. 129.) Differences as to price between persons entitled to pre-emption and the company are to be settled by arbitration (x), the costs of the arbitration being in the discretion of the arbitrator (Sect. 130); and upon payment or tender of the purchase-money, the company are bound to convey (y) the lands to the purchaser : (Sect. 131.)

(p) See *L. & S. W. R. Co. v. Gomm*, 46 L. T. 119, and post.

(q) For a special act allowing building leases to be granted, and the ground rents to be sold, see Metropolitan Inner Circle Completion Act, 1871, 37 & 38 Vict. c. xcix. ss. 61, 65.

(r) See *Gardiner v. London, Chatham and Dover R. Co.*, ante, p. 127; *Ogilvie, In re*, L. R., 7 Ch. 174.

(s) A tenant under the company cannot set up that under this section the company's title has expired. *L. & N. W. R. Co. v. West*, 36 L. J., C. P. 215.

(t) As to what are such lands, see *Lord Carington v. Wycombe R. Co.*, L. R., 2 Eq. 825; L. R., 3 Ch. 377; 37 L. J., Ch. 213; *L. & S. W. R. Co. v. Blackmore*, ubi supra. In *Corentry v. L. B. & S. C. R. Co.*, 37 L. J., Ch. 90, it was held that

"lands, used for building purposes," must be lands actually laid out for those purposes at the time of their being taken by the railway company.

(u) The lands may have been "severed," although a high-road intervened. See *Hobbs v. Midland R. Co.*, L. R., 20 Ch. D. 118, per Manisty, J.

(x) It is very doubtful whether this means an arbitration in the ordinary course, or an arbitration as pointed out in the earlier sections of the act. *Jones v. South Staffordshire R. Co.*, 19 L. T. 603; and see per Cairns, L. J., in *Lord Carington v. Wycombe R. Co.*, L. R., 3 Ch. 377.

(y) The word "grant" in the conveyance operates as express covenants by the company that the lands are free from incumbrances, for quiet enjoyment, and for further assurance. Sect. 132.

These sections apply only to superfluous lands properly so called, and not to lands abandoned in consequence of the railway company giving up their scheme (a); nor to lands acquired by the company by agreement for extraordinary purposes under the 45th section of the Railways Clauses Act, 1845 [ante, p. 162] (a) or by agreement under specific clauses (which pointed to a perpetual user) in the special act (b), but the better opinion is that the sections apply to lands acquired by agreement for ordinary purposes (c), and indeed it is impossible to see how such lands are not just as much "acquired" within the meaning of the heading to the sections dealing with superfluous land as lands compulsorily taken are. A sale by the company is not conclusive evidence that the lands were superfluous (d).

Application of sections relating to superfluous lands.

The sections do not apply to land under arches over which the railway runs (e); nor to land over a tunnel (f); nor to land resting upon the footings of the retaining wall of a railway embankment (g). The right of pre-emption arises immediately upon the lands being offered for sale to a third party, although such offer may have been made before the expiration of the ten years (h).

Arches and tunnels, &c.

A sale with power to the company to require a re-conveyance from the purchaser at any future time (which mode of sale is not infrequent (i)) is void, both as contravening the direction of the statute that the sale shall be absolute, and the rule against perpetuities. This was held by the Court of Appeal in *L. & S. W. R. Co. v. Gomm* (k). In that case the company sold land, declared to be superfluous, to an adjoining owner, who covenanted for his heirs and assigns to re-convey, and sold to Gomm. The company sought to enforce specific performance of the covenant to re-convey against Gomm, but the court refused specific performance on the above grounds, and also on the ground that the covenant was not binding on "assigns."

"Absolute sale."  
Gomm's case.

(c) *Smith v. Smith*, L. R., 3 Ex. 282; 38 L. J., Ex. 37.

(a) *City of Glasgow R. Co. v. Caledonian R. Co.*, L. R., 2 Sc. App. 160.

(b) *Horne v. Lynnington R. Co.*, 31 L. T. 167. In this case the land claimed as superfluous was a certain bridge property, and the company were expressly empowered to take tolls for the bridge.

(c) See per Bramwell, L. J., in *Hooper v. Bourne*, L. R., 3 Q. B. D. at p. 272, and per Cotton, L. J., ib. at p. 285.

(d) *Hobbs v. Midland R. Co.*, L. R., 20 Ch. D. 418; 51 L. J., Ch. 320, per Manisty, J.

(e) *Mulliner v. Midland R. Co.*, L. R., 11 Ch. D. 611. In this case it was held

that the company could not grant a private right of way under the arches.

(f) *Metropolitan District R. Co. and Cosh, In re*, L. R., 13 Ch. D. 607—C. A.

(g) *Ware v. London, Brighton and South Coast R. Co.*, 52 L. J., Ch. 198; 47 L. T. 541; 31 W. R. 228.

(h) *L. & S. W. R. Co. v. Blackmore*, L. R., 4 H. L. 610; 39 L. J., Ch. 713; 28 L. T. 504.

(i) See *Rosenberg v. Cook and Best v. Hammond*, post.

(k) L. R., 20 Ch. D. 562; 51 L. J., Ch. 530; 46 L. T. 449; 30 W. R. 620—C. A., reversing Kay, J., 51 L. J., Ch. 193.

<sup>3</sup> *Sale of Superfluous Land.*

Land vests in owners as "superfluous," although once used for railway.

*G. W. R. Co. v. May.*

The leading case upon the subject of superfluous lands is *Great Western R. Co. v. May* (1). In that case, the company, after notice to treat under their compulsory powers, purchased by agreement land marked partly within and partly without the limits of deviation. On part of the land they constructed the railway, erecting thereon a station and other works; upon another part they deposited chalk and spoil which had been excavated from a cutting. After the railway was finished, the company let this other portion of the land to tenants paying rent. It was held by the House of Lords, affirming the unanimous judgments of the two Courts below, that although the land so let had been once used for the purpose of the railway, it became superfluous land, and vested in the person from whom the company had purchased it.

Lord Cairns, in giving judgment, observed,—

"It appears to me that land may become" superfluous land "in one of four different ways. It may be, in the first place, land originally taken under the compulsory powers, but taken upon a wrong estimate or calculation of the quantity which would be required; or it may be, in the second place, land which, under the provisions of the other clauses, the company may have been forced to take by reason of their wishing to take a part only of the premises. . . . Or, in the third place, it may be land taken and required originally for the permanent works of the line, but which, in the course of years, turns out to have been occupied by works which are abandoned, and which consequently becomes land no longer required. Or it may, in the fourth place, be land which has been allowed to be taken by the company, or which has been forced to be taken by them for temporary purposes, and which has been taken with the intention only of its being used for temporary purposes, which temporary purposes have come to an end."

After defining superfluous land as "land originally acquired for the purposes of the undertaking, but which is not required for the purposes of the undertaking," and pointing out that the company might have justified the retention of the land if they had been able to show that they wanted it for continuing works, Lord Cairns lays down the rights of the owner as follows:—

"It appears to me that the operation of vesting does not depend in any way upon the consent or acceptance of the owner of the land. It is an absolute complete parliamentary vesting of the land. Those cases founded chiefly upon the old doctrine of entry for condition broken, or upon the covenants in leases introduced for the benefit of the lessor, in which it has been held that words which would apparently make the grant or the lease void, are to be made effectual by

(1) L. R., 7 H. L. 283; 43 L. J., Q. B. 283; 31 L. T. 137, affirming *May v. Great Western R. Co.*, L. R., 7 Q. B. 364; L. R., 8 Q. B. 26; 41 L. J., Q. B. 104; 42 L. J., Q. B. 6; 26 L. T. 17; 27 L. T. 620.

some further act, indicating that the person entitled to take advantage of the condition desires to do so, have in my mind no bearing whatever on the present case."

The right of the owner, therefore, is an absolute one; and it is not personal only, but devolves upon the owner's successor in title, as also does the right of pre-emption. But although the prescribed period may have expired, the land does not vest in the owner, if the company *bonâ fide* retain it for the purposes of the act, and with a reasonable expectation of using it for such purposes, merely because it cannot be immediately applied for such purposes; and pending such application of it, the company may let it or put it to any use they please, so long as they do not sell or offer it for sale (*m*).

Land does not vest in owners as "superfluous" if *bonâ fide* retained.

The making of accommodation works for the use of another land-owner is a use of the land for the purposes of the act (*n*).

The exception in respect of land situate within a town, or built upon or used for building purposes, is an important one. It has been held that the terms of it are not satisfied by the mere fact of the land being within the borough boundary of a town, or having upon it one or two houses. It must belong to that part of a town which is covered with continuous buildings, or must be itself covered with continuous buildings. In fact, it must be situated in a town, in the popular, not the legal, sense (*o*).

Meaning of "town."

The company may enter into a valid *contract* to sell superfluous lands to a purchaser, although they have not offered them to the persons entitled to pre-emption, though they cannot complete their title or the sale, and *convey* the lands, until they have made such offers as the statute requires (*p*). It has also been held (*q*) that the vendor's right of re-purchase is entirely dependent on the 127th and 128th sections, and no immediate right of re-purchase arises within the ten years; and that though a person having an inchoate right of pre-emption may apply to the Court for an injunction to restrain damage to the property during the ten years, he is not entitled to prevent all use of it during that period.

Contract before offer to owner.

(*m*) *Betts v. Great Eastern R. Co.*, L. R., 8 Ex. 294; 43 L. J., Ex. 4; affirmed by Court of Appeal 3 Ex. D. 182, and also by the House of Lords, "where the finding of the jury was treated as conclusive upon the fact, and so no point of law determined." *Hooper v. Bourne*, L. R. 5 App. Cas. 7, n. See also *Hooper v. Bourne*, L. R., 5 App. Cas. 1, in which the facts were stated for the Court by an arbitrator. This case in no way conflicts with *May's case*.

(*n*) *Beauchamp (Lord) v. Great Western R. Co.*, L. R., 3 Ch. 745; 19 L. T. 189.

(*o*) *Carlington (Lord) v. Wycombe R. Co.*, L. R., 3 Ch. 377; L. & S. W. R. Co. v. *Blackmore*, L. R., 4 H. L. 610; 39 L. J., Ch. 718; 23 L. T. 504, affirming *Blackmore v. L. & S. W. R. Co.*, 38 L. J., Ch. 19; 19 L. T. 4; 16 W. R. 1105. In this case Toddington in Middlesex was held not to be a "town."

(*p*) *London and Greenwich R. Co. v. Goodchild*, 3 Railw. Cas. 507; 8 Jur. 455.

(*q*) *Astley v. Manchester, Sheffield and Lincolnshire R. Co.*, 27 L. J., Ch. 299; 2 De G. & J. 453.

8. *Sale of Superfluous Land.*

Restrictive covenant.

Reviver, on sale, of statutory restriction on building.

Right of purchaser to support.

*Pountney v. Clayton.*

Lessee for years entitled to pre-emption.

Strip between in lye and fence.

A company, in selling, are entitled to impose a restrictive covenant on the purchaser, as that no public-house shall be erected on the land (7).

If an Inclosure Act provides that no buildings shall be erected on a piece of land, the acquisition by a company of such piece neutralizes such provision in the hands of the company only and for the purposes of their special act; and if any part of the land be afterwards sold as superfluous, the restriction of the Inclosure Act revives, and the purchaser of the part so sold as superfluous can be restrained from building upon it (8).

The purchaser from a company of land, compulsorily purchased by them with minerals, does not acquire the right of subjacent support for his surface against the owner of the minerals, and therefore cannot maintain an action for damages against the mine owner for so working his mines as to cause injury to the surface and the buildings erected thereupon (9).

It has also been decided (10) that a lessee for years is an adjoining owner and entitled to pre-emption, although his lands are separated from the surplus lands by a private road, the ownership of the soil of the road being in the reversioner: and where several persons were owners, each was held entitled to pre-emption over the whole before any part was sold to a stranger. A person may be an adjoining owner although he purchased the adjoining lands from the company itself, and all adjoining proprietors have equal rights of pre-emption; and in a case where only one person claimed, an inquiry was directed whether there were any other adjoining owners desirous of purchasing (11).

In *Norton v. L. & N. W. R. Co.* (12), the company in 1838 erected a post and rail fence on the boundary of certain lands acquired under their act. They then made a ditch within the fence, and threw up a bank on which they planted a quickset hedge at the distance of 4 feet 6 inches from the fence. In 1846 the fence, which had been allowed to decay, as the hedge grew up, was removed. From 1854 to 1875, when the action was commenced, the strip of land between the hedge and the site of the fence was occupied and cultivated with the rest of the adjoining land, the company in no way

(7) *Lea v. Hogman and Hitchman's Com-track*, L. R., 21 Ch. D. 95; 51 L. J., Ch. 772; 30 W. R. 700, per Hill, V.-C.

(8) *Bird v. Eagleston*, L. R., 29 Ch. D. 1012; 51 L. J., Ch. 819; 53 L. T. 57. 33 W. R. 774, per Pearson, J.

(9) *Pountney v. Clayton*, L. R. 11 Q. B. D. 820; 52 L. J., Q. B. 566; 49 L. T. 283; 31 W. R. 661—O. A., reversing Denman, J., 47 L. T. 731.

(10) *Clayton v. L. & N. W. R. Co.*

37 L. J., Ch. 90; L. R., 5 Eq. 101.

(11) *L. & N. W. R. Co. v. Blackmore*, *ubi supra*. It would seem that the claims of parties under disability may be ascertained (sect. 128). But see per Lord Hatherly in *Hoff v. Ross*, *ubi supra*.

(12) L. R., 13 Ch. D. 268; 47 L. J., Ch. 559; 41 L. T. 129; 28 W. R. 173—C. A., affirming Malins, V.-C., L. R., 9 Ch. D. 623; 17 L. J., Ch. 859; 39 L. T. 25; 27 W. R. 252.

interfering except that their workmen went over it to trim the hedge. It was held by the Court of Appeal to be clear (1) that the strip was superfluous land, and (2) that the company's title had been extinguished by the Statute of Limitations.

The cases of *Best v. Hamand* (z) and *Rosenberg v. Cook* (a) may <sup>Re-sale</sup> be consulted as to the rights of vendor and purchaser in cases where land bought from a company with a defective title, is re-sold to a second purchaser.

(z) L. R., 12 Ch. 1 (C. A.).

(a) L. R., 8 Q. B. D. 162 (C. A.). In

this case the land being over a tunnel was not properly "superfluous."



## CHAPTER IX.

### ON THE POWERS AND OBLIGATIONS OF RAILWAY COMPANIES TO CON- STRUCT AND REPAIR THE WORKS CONNECTED WITH THE RAILWAY.

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#### *The Line, and Deviations.*

#### 1. *The Line of Railway, and herein of Deviations.*

THE plans and books of reference, which are required by the Standing Orders of both Houses of Parliament (a), and are referred to in every special act, point out the course of the railway, and, with the exceptions presently to be noticed, no deviations from the line thus laid down are permitted (b). But a power to rectify mistakes is reserved to the company, by the Railways Clauses Act of 1845 (8 & 9 Vict. c. 20). Thus, by sect. 7, if any omission, misstatement or erroneous description has been made of lands or owners, &c. in the parliamentary plans, schedules or books of reference, the company,

Errors in plans  
&c., rectified.  
R. C. Act, s. 7.

(a) C. S. O. 51-55; L. S. O. 39-44. For the penalty for obstructing any person setting out the line, see sect. 24 of the Railways Clauses Act of 1845.

(b) For this reason, it frequently becomes necessary to obtain a supplementary act, to authorize deviations in the line. A company were empowered to take lands, and to deviate 100 yards within two years expiring in July, 1838. In January, 1837, a deviation in the line, within the prescribed limit, was made. By an act, passed in May, 1837, the time by the first act limited for the compulsory purchase of lands was enlarged for one year, but it was provided that no deviation from the line

laid down should be made after the expiration of the period by the first act limited. The company having, after July, 1838, given notice to owners of land on the line to which they had deviated in January, 1837, of their intention to take the lands—on a motion for an injunction, Lord Cottenham, C., decided that the second act gave the company an enlarged period of one year, in which to exercise the power of taking the land in the line to which they had so deviated. *Dun Navigation Company v. North Midland R. Co.*, 1 Railw. Cas. 135. The compulsory powers usually last from three to five years.

after giving notice, may apply to two justices, who may certify that the omission arose from mistake, and thereupon correct the same (c). The certificate must be deposited with the clerks of the peace, parish clerks and postmasters, with whom the plans are deposited; and after such certificate has been given, the company may make the works in accordance with it. And by sect. 8, the company are required to deposit with the clerks of the peace, parish clerks and postmasters, a plan and section of all alterations from the original plans and sections which have been approved by Parliament. These plans may be inspected and copied by persons interested, in the same manner as the original plans and sections under 7 Will. 4 & 1 Vict. c. 83 (d): (Sect. 9.) Copies of these plans and books of reference, certified by the clerk of the peace, are receivable in evidence: (Sect. 10.)

Deposit of altered plan with clerks of the peace, &c., sect. 8.

The special act usually contains a clause to the following effect:—

“And whereas plans and sections of the railway, showing the lines and levels thereof, and also books of reference, containing the names of the owners and lessees and occupiers of the land through which the same is intended to pass, have been deposited with, &c.: be it enacted, that, subject to the provisions in this and the said recited acts contained, it shall be lawful for the said company to make and maintain the said railway and works, in the line and upon the lands delineated on the said plans, and described in the said books of reference, and to enter upon, take and use such of the said lands as shall be necessary for such purpose.”

Railway must be made according to deposited plans.

This provision makes it important to ascertain to what extent the plans and sections and books of reference thus referred to are so incorporated with the special acts as to make them obligatory upon the company, when they proceed to construct the railway and other works.

It has been decided by the House of Lords, and may be considered to be settled beyond dispute, that the plans deposited under the Standing Orders, prior to the introduction of a bill into Parliament, are not binding upon the company nor to be regarded, except so far as the representations they contain are afterwards incorporated in and made part of the act of Parliament (e).

Deposited plans not binding, except as made part of act.  
*North British R. Co. v. Tod.*

The above rule was laid down in the case of *North British R. Co. v. Tod* (f). The facts of this case were as follows:—The deposited plans showed that a railway would intersect an avenue leading to a

(c) *Taylor v. Clemons*, 2 Q. B. 978; 3 Railw. Cas. 85; 11 Cl. & Fin. 610. It would seem that if the justices are satisfied that the omission, &c., arose from mistake, they are bound to certify. In *Ex parte Central Wales R. Co.*, Q. B., Mich. T. 1864, the Court of Queen's Bench granted a rule nisi for a mandamus to justices to certify under sect. 7, which rule was afterwards made absolute by consent on certain terms.

(d) See vol. II.

(e) This rule renders it incumbent on landowners not to rely upon the statements in the deposited plans, as to the surface levels.

(f) 12 Cl. & F. 722; 5 Bell, 184; 4 Railw. Cas. 449; see also *Ware v. Regent's Canal Co.*, 28 L. J., Ch. 158; 3 De G. & J. 212; 23 Beav. 575; *Attorney-General v. Great Eastern R. Co.*, L. R., 6 H. L. 367.

1. *The Line, and Deviations.*

Plans not binding, except as made part of special act.

*North British R. Co. v. Toul.*

mansion-house, in a cutting of fifteen feet four inches, and that the level of the roadway of the avenue, at that place, would be raised two feet by a bridge, under which the railway would be carried. The owner of the mansion-house was averse to the railway being carried through his avenue at all, but, relying upon the representations contained in the plan and sections, was induced to abstain from opposing the bill in Parliament. The company, after the act was obtained, proposed to intersect the avenue, by a cutting of only two feet ten inches; and the bridge would in consequence rise seventeen-and-a-half feet above the level of the avenue, thereby causing a deep descent on both sides. This proposed line was clearly within the limits of deviation permitted by the acts of Parliament, both vertically and laterally, but the descriptions in the deposited plans and sections, which showed the cutting of fifteen feet four inches, were founded upon a mistake made by the engineer who prepared them. Under these circumstances, the Court of Session in Scotland prohibited the company from crossing the avenue in the manner proposed; but their decision was reversed by the House of Lords, who laid down the rule above mentioned, and held that in the case then before the House, the special and general railway acts *made the plan only binding to the extent of determining the datum line*, and the line of railway measured with reference to that datum line, but *not* with reference to the *surface levels* of the lands; and that it made no difference that the deposited plans were so incorrect as altogether to mislead the owner of the lands, with reference to the manner in which his property would be affected by the railway works.

In giving judgment, Lord Lyndhurst, C., said,—

“The first question is, what is the rule in respect to applications for interdicts in Scotland, or for injunctions in England, as applicable to cases of this kind? The case on the part of the respondent being, that a plan was exhibited to him and to the public, previous to the passing of the act under which the railway was intended to be made, which plan represented that the railway would pass over his land, in a cutting of something more than fifteen feet from the surface. The respondent alleges that, giving faith to these representations, he had, as he naturally might, come to the conclusion as to what course he was to pursue with reference to the supposed state of circumstances as represented upon that plan; and that now the company have not only deviated, which they had a right to do, by another line within the prescribed distance, which is one hundred yards, but they also propose to deviate beyond five feet vertically, which is the limit of the vertical deviation imposed by the act; that is, they propose to come nearer the surface by a space exceeding five feet. The company say that they do not dispute that they are actually coming nearer the surface, to a much greater extent than the five feet, but they say, that they are still within the prescribed deviation from the datum line, as laid down for the formation of the railway; the datum line being an imaginary line, taking its commencement from some given point at a certain elevation, and then that line is supposed to run in a perfectly horizontal direction,

and the inclination of the railway is measured with reference to that datum line. They say they are within the distance,—that is, within the five feet of the line laid down upon those plans, measured with reference to the datum line; and they contend, therefore, that they are within the provisions of the act of Parliament, and that they are not deviating beyond what that act authorizes. Now, as to the effect of plans exhibited previous to the contract being made, or previous to the act of Parliament being obtained, it does seem, from cases which have occurred both in Scotland and in this country, that the rule of the Courts in this country and in the other is no longer a matter of any doubt or dispute. If a contract, or an act of Parliament, refer to a plan, to the extent that the act refers to the plan, and for the purpose for which the act or contract refers to the plan, undoubtedly it is part of the contract or part of the act. As to that there is no dispute. A contract or an act of Parliament either does not refer to a plan at all, or it refers to it for particular purposes.”

Lord Lyndhurst's judgment.

After referring to *The Feoffees of Heriot's Hospital v. Gibson* (g) and *Squire v. Campbell* (h), and pointing out that he relied upon the authority of the former case, the Lord Chancellor proceeded :—

“We are not to look at what was represented upon the plan, except so far as its representation is incorporated in, and made part of, the act of Parliament; and the real question, therefore, turns upon this, whether the acts of Parliament do or do not make the datum line, and line of railway with reference to that datum line, the subject-matter of these enactments, and the rule by which the rights of the parties are to be regulated, or whether it also includes the surfaces which, in this instance, accidentally, no doubt, had been very much misrepresented upon the plan. We are first of all, then, to refer to the act of Parliament under which this railway is to be carried into effect, and the enactment is in the 16th section. I may here observe, before I refer to that section, that everything which is out of the act, is to be found in the Standing Orders of the one House or the other; but the plans, which are required to be exhibited by those Standing Orders, except so far as they are made part of this act, are, as I apprehend, entirely out of the question; for although it may be very convenient that Standing Orders should require plans to be exhibited, containing matters which are not binding between the parties, still, when we are looking to what the rights of the parties are, we can only look to the act of Parliament by which those rights are regulated. Plans or proceedings previous to the enactment can have no effect upon the enactments themselves. [His lordship then read the 16th section of the special act, which is similar to the usual clause set out, ante, 339.] There is a parliamentary authority that the parties are to be at liberty to make ‘the railway and works on the line, and upon the lands delineated in the said plans.’ We have therefore only to look at what is the meaning of the word ‘line’ as used in this act of Parliament. The reciting part of that section speaks of ‘lines’ and ‘levels.’ It is therefore necessary to look to other acts, the general acts being required to be incorporated, to see what is the meaning of those terms used in this section; because this is a power under which the company are to act, and if they bring themselves within the meaning of the enactment, explained by provisions and sections to be found in other acts of Parliament, beyond all doubt they are then exercising the powers which the Legislature intended to vest in them. In the Railways Clauses Consolidation

(g) 2 Dow, 801.

(h) 1 My. & Cr. 459.

1. *The Line, and Deviations.*

Plans not binding, except as made part of special act.

*North British R. Co. v. Tod.*

Act for Scotland (8 & 9 Vict. c. 33), we have several sections to which it is necessary to refer (i); to the 7th and 8th I only refer for the purpose of observing, that the plans which are therein referred to, are in cases where, after the original plans have been deposited, it has been found that they contain certain errors, and then it defines the means by which the parties are to correct those errors and to make their plans correct. But by the 11th section, 'In making the railway it shall not be lawful for the company to deviate from the levels of the railway, as referred to the common datum line, described in the section approved of by Parliament and as marked on the same, to any extent exceeding, in any place, five feet, without the previous consent of the owners,' &c. It then provides for the case of passing through a town, as to which other provisions are introduced. The description, therefore, of the levels, when it speaks of the levels of a railway, is in very distinct terms. It describes the level of the railway as referring to the common datum line described in the section approved of by Parliament.

'The 15th section provides for a lateral deviation, which is not now in question. The question which is given by that section has been acted upon, and it is not contended that the lateral deviation does exceed that power. Then come the enactments of the 16th section, 'That subject to the provisions in this and the said recited acts contained, it shall be lawful for the company to make and maintain the railway and works in the line and upon the lands delineated in the said plans.' And then it goes on to enumerate the works which the company are to be authorized to make. Now, taking these enactments, because I do not find that the other acts contain any provisions which are very material to be attended to,—taking those two enactments together, it appears to me to be quite plain, that the Legislature intended, in speaking of lines, and in speaking of levels of the intended railway, to confine those provisions and to refer them to the datum line, and not to any other representation. Although great convenience may arise from the plans and sections required by the Standing Orders to be exhibited, previous to the application to Parliament for powers to make the railway, representing the surface as well as the datum line, and the intended line with reference to that datum line, yet if any difficulty should arise as to the construction to be put upon the section to which I have referred, we must recollect that Parliament must be supposed to have had before it, not only the line, as explained in those sections, but also the other surface line which is exhibited in the plan. But the enactment totally disregards the surface line, and confines it in terms to the datum line,—to the line of railway to be measured and ascertained with reference to its distance from the datum line.

"I say, then, that a case does arise upon these provisions of the act, in which the plan indeed is referred to, but is, in the terms of the act of Parliament, referred to only for the purpose of ascertaining the line of the railway, with reference to the datum line. It is not referred to with reference to any surface level. The plan, therefore, is entirely out of the enactment, and it is not to be looked at for the purpose of construing the enactment, as to any part of it, except so far as it is referred to and incorporated in the act. Arriving at that construction of the rule upon the provisions of the two acts to which I have referred, and applying it to the principle which has been established in the cases I have mentioned, we have no difficulty in coming to the conclusion, that the application of that principle will necessarily lead to the construction of the clauses to which

(i) The sections referred to are substantially identical with the corresponding ones of the English act.

I have referred. The plan is binding, to the extent of determining the datum line, and the line of railway measured with reference to that datum line, but not with reference to the surface levels of the land, because the act does not apply it for that purpose, but cautiously confines the enactment to the other plans to which I have referred."

Lord Campbell concurred without hesitation, but with very great reluctance, looking to the hardship upon the respondent. He observed that it was evident that the 11th section made the datum line alone that which was to be regarded, and added :—

"There certainly was a representation made here on the part of the company, when they proposed to bring in the act, by which they intimated that, at that time, the intention was that the railway should be fifteen feet four inches below the surface of the respondent's property at the point of intersection; and that the bridge, by which his approach should pass over the railway, would not be more than three feet. But this was entirely an intimation, on the part of the company, that such was their intention. An act of Parliament of this sort has, by Lord Eldon and by all other judges who have considered the subject, been considered as a contract. Well, then, what took place was a negotiation, it was not a contract. We must disregard it, and we must look to see what the contract was. The contract is to be gathered from the words of the act of Parliament; and that brings us to the question that I first considered, what is the construction of the act of Parliament? That act of Parliament must be considered as overruling and doing away with everything that had taken place prior to the time when the act passed, and renders the representation or proposal of the company, pending the act, of no avail. Many cases have occurred in the Courts of common law in which it has been held that everything that takes place before a written contract is signed, is entirely to be disregarded in construing the contract. Now, if the respondent had been cautious, he would have done what I would strongly recommend to all gentlemen hereafter to do, under similar circumstances, which is, to have a special clause introduced into the act of Parliament to protect their rights. I do not believe there is any committee, either in the House of Commons or in the House of Lords, who, if he had asked for a clause, providing that the railroad should be of the depth of fifteen feet four inches (with a power of vertical deviation, perhaps), in crossing his approach, and that he should be able to pass it by a bridge, not more than three feet in height, would not have acceded to such a clause as a matter of course; for it is only reasonable that the respondent's property should be protected in this manner; and that he should be saved from such deformity being erected in the sight of his dwelling-house, which would, for all time to come, be a great nuisance thereto, and might diminish its value. But he abstained from introducing any such clause, and therefore he must be considered as having acceded to the company's having all the powers which the act of Parliament confers upon them."

Lord Campb  
judgment.

This decision of the House of Lords has frequently been acted upon in subsequent cases. The following is an instance (j) :—The plaintiff was lessee of certain premises in Hill Street and Navigation

Altering level  
of street.  
*Beardmer v. Lon-  
don and North-  
Western R. Co.*

(j) *Beardmer v. L. and N. W. R. Co.*, 13 Jur. 337; 1 Hall & Tw. 161; and see 1 Macon. & G. 112; 18 L. J., Ch. 322; *Breynton v. Same*, 10 Beav. 238.

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Altering level  
of street.

Street, Birmingham. The defendants obtained an act for carrying their railway through both these streets, which cross each other at right angles. In the construction of their works it became necessary to erect two bridges, for connecting the portions of the streets intersected by the railway. Both streets were included in the plans and books of reference, but when the plans were deposited it was not contemplated, and it did not appear upon them, that any change in the surface level in Hill Street would be requisite, and the only alteration in the level of Navigation Street delineated in the plans was caused by an elevation, sufficient to carry that street over the railway at an ascent of one foot in forty, which would not bring the commencement of the incline or embankments nearer to the plaintiff's premises than thirty-six feet. Shortly after the special act was obtained, it was deemed expedient to raise the level of the railway at the point where it intersected Navigation Street, such vertical deviation being within the limits allowed by the general act (8 & 9 Vict. c. 20, s. 11). In consequence of this, the bridge in Navigation Street was so elevated as to involve the necessity of raising the approach to it from the plaintiff's side, and of carrying it past his premises, by an embankment five feet high; and a similar embankment had to be constructed in Hill Street. The company having commenced their works, and the access of light and air to the plaintiff's premises being thereby obstructed, he obtained an injunction from the Vice-Chancellor of England, to restrain the company from altering the levels of the streets to any other extent than was shown upon the plans and sections. But Lord Cottenham, C., upon appeal dissolved the injunction and observed,—That there was no inconsistency between the 14th and 15th sections of the Railways Clauses Act, that the term "other engineering works" in the former section could not be interpreted as including the alterations which the defendants had made in the approaches to the bridge, and which were clearly within the powers conferred on them by the 16th section. His Lordship added, that in fact there was no distinction between this case and *The Feoffees of Heriot's Hospital v. Gibson* (k), and *North British R. Co. v. Tod* (l), the latter of which expressly decided that the deposited plans and sections are not to be referred to for the purpose of construing the special act, except so far as they may be incorporated within its provisions, and that they are only binding to the extent of the datum line, and the line of railway measured with reference to that datum line; but that they are not to be referred to for the purpose of surface levels, or in the construction of any collateral or accommodation works, which may be requisite during the formation

(k) 2 Dow, 301.

(l) 12 Cl. & F. 722.

of the railway and which are within the powers conferred by the 16th section.

Similar principles were again acted on in *R. v. Caledonian R. Co. (m)*, in which the main question upon the return to a mandamus was, whether the company were bound by the rates of inclination in the plans and sections deposited, as respected the carrying of the carriage road across the line of railway.

Lord Campbell, C. J., said,—

“It is quite clear on general principles, and on the authority of *North British R. Co. v. Tod*,\* that the mere exhibition of plans and sections in Parliament does not make them obligatory upon the company when they obtain an act; it can only be something in the special act itself, or the general act, which can have that effect. It was supposed that by the general act, 8 & 9 Vict. c. 20, s. 14, this obligation must be imposed, considering this road as an ‘engineering work;’ but it is quite clear that section applies only to the construction of the railway, and not to cross-roads. Then it has been allowed that in the first special act there is nothing to make these plans and sections obligatory. But reliance is placed on the 9th section of the 9 & 10 Vict. c. cexlix, which provides that ‘it shall be lawful to the company to construct the bridge for carrying the railway hereby authorized over any roads, or for carrying any roads over the said railway, of the heights and spans and in the manner shown on the section deposited as hereinbefore mentioned.’ The inclination of my opinion is, that this section is obligatory so far as it goes; but the question is, to what extent does it go? And we think that it only applies to the heights and spans delineated in the plans and sections, which are expressed, and *expressio unius est exclusio alterius*. There is nothing said as to the rates of inclination, and it would be strange if they had been in the same way rendered obligatory, because there is a power of deviation from the datum line of railway, which would render them wholly inapplicable. Therefore we think sect. 9 of the supplemental act applies only to the heights and spans delineated in the plans and sections deposited, and they have been followed, although the rates of inclination have been altered. There must, therefore, be judgment for the defendants.”

Where a special act gave power to stop up streets within a given area, and the plans and sections described *Sun Street*, which was within the area, as crossed by an arch, it was held by the House of Lords that the company might stop up Sun Street, and build a station upon it (n).

With respect to lateral deviations, it is enacted, by the Railways Clauses Act, sect. 15, that the company may deviate from the line delineated on the plans, but not to a greater distance than the limits of deviation delineated upon the said plans, nor to a greater extent,

(m) 18 Q. B. 19; 20 L. J., Q. B. 147. See also *Simpson v. South Staffordshire Waterworks Co.*, 31 L. J., Ch. 830.

(n) *Attorney-General v. Great Eastern R. Co.*, L. R., 6 H. L. 387: affirming decision below (L. R., 7 Ch. 475), which

had reversed that of Bacon, V.-C., ib. 478, n. See also for the construction of a series of clauses in a special act as to stopping up streets, *Temple v. Flower*, 41 L. J., Ch. 804.

*R. v. Caledonian R. Co.*

\* Page 830, ante

Stopping up street.

Lateral deviations.  
R. C. Act, s. 15.



1. *The Line, and Deviations.*

in passing through a town, village or lands continuously built upon, than ten yards, or elsewhere to a greater extent than one hundred yards from the said line; and the railway, by means of such deviations, must be not made to extend into the lands of any person whose name is not mentioned in the books of reference, without the consent in writing of such person, unless the name of such person shall have been omitted by mistake, and the fact that such omission proceeded from mistake shall have been certified in manner provided for in cases of unintentional errors in the books of reference.

If the line is carried to the extent of the line of deviation, slopes, &c., may be taken by consent beyond the prescribed limits.

*Doe d. Payne v. Bristol and Exeter R. Co.*

In a case (n) where the lands to be taken for the line were not to exceed twenty-two yards in breadth, except where a greater breadth should be necessary for embankments, &c., and it was provided that the company should not deviate from the line delineated on the plan, with or without consent, more than 100 yards, and that no deviation should extend into the lands of any person not mentioned in the book of reference, unless omitted by mistake; and the company were empowered to make such deviations in the section as might be necessary in consequence thereof; it was held that the statute only prohibited the company from making the substituted line of the railway itself at a greater distance than 100 yards from the line delineated in the plan; but that it did not prevent them from taking lands by consent at a greater distance from it than the 100 yards, for the purpose of embankments, cuttings, &c., the intention of the act being to give the company the same incidental powers with respect to the deviated line as they had with respect to the original line. Alderson, B., said,—

“With respect to the deviation, it appears to me to be a very simple question. In the parliamentary plan a line is laid down, and a certain deviation from that line is permitted to take place. The parliamentary plan is to be the guide for persons taking it in their hands to know in what direction the railroad is to go across the face of the country. What is ‘the line’ laid down in the parliamentary plan? What line across the country does it represent? It appears to me that it represents the *medium filum vie* of the railway which is to be thereafter made; and the deviation which is to be allowed is to be a deviation between the *medium filum vie* of the railway, as described by the parliamentary plan, and the *medium filum vie* of the railway which is ultimately to be laid down; and if between these two corresponding points an interval of not more than 100 yards exists, measured in a horizontal level, the deviation does not exceed that which is allowed by the act of Parliament to be made. That appears to me to be a correct definition of the deviation allowed by the act; and if that be so, according to the evidence in this case, the distance between the two lines does not exceed the limit which the act of Parliament has provided. But it is suggested to us that the word ‘deviation’ cannot have this sense, and cannot mean the interval between the two *media fila vie*, by reason of the words in the same clause, which provide that

'the deviation shall not extend into lands not mentioned in the books of reference.' I perfectly agree that the deviation cannot extend into lands not mentioned in the books of reference; and, inasmuch as this is a parliamentary bargain between the public (including the railway proprietors) on the one side and individuals on the other, I agree that it must be faithfully and correctly performed, and there can be no deviation at all into lands not mentioned or defined by the act of Parliament; for although the parties themselves might permit the company to go over some of their lands, yet other people have an interest not to allow it. But this provision, as it appears to me, does not extend to more than the line of railway—it does not extend to slopes and embankments. The railway itself can go only to a certain distance from the original line; and when it does not exceed that distance, it can be of no importance to the parties through whose lands it passes, whether the lands of other people be taken for slopes or embankments, provided they be taken with their consent: they cannot be taken without. It therefore appears to me, if the deviation does not go into lands not contained in the books of reference, it is competent for the company to proceed with their slopes and embankments in other lands, provided they have the consent of the parties to whom those lands belong, and not without" (p).

This decision was afterwards followed in the Queen's Bench, in a case (q) where the Court said the expression "deviation" in the acts of Parliament, and particularly the 8 & 9 Vict. c. 20, s. 15 is to be taken with reference to the line of railway only; that is, that the line of railway actually laid down shall not deviate more than 100 yards from the line laid down and delineated in the parliamentary plans, the *medium filum viæ* of each being the commencement and termination in measuring those 100 yards.

Meaning of  
"deviation."

It has been recently held by Hall, V.-C., that the word "delineated" cannot be limited to mean surrounded on every side by lines, but means rather sketched or represented, or so shown that the landowners would have notice that the land might be taken. Therefore, where the boundary of a plot of land was left unclosed outside the limits of deviation, the company were allowed to take the land up to the limits of deviation (r). It would seem that where land is taken beyond the limits, relief by injunction will be refused if the value of the land be very small (s). In any case an injunction

Meaning of  
"delineated."

(p) A railway act prescribed the general line of the railway, and afterwards (sect. 59) directed that it should pass between streets A. & C., and so as to leave 24 yards between the railway and either A. or C.; or otherwise, if there were not 24 yards between, the company should, if required, purchase such space as was less than 24 yards, and also half of A. or C., as the case might be. The railway, without deviating from the line first prescribed, passed over street A.; but the company had previously purchased the whole of street A. It was decided that this was a

compliance with sect. 59. *Taylor v. Clemson*, 2 Q. B. 978; 8 Railw. Cas. 65; 11 Cl. & F. 610.

(q) *Doe d. Armistead v. North Staffordshire R. Co.*, 20 L. J., Q. B. 249; 18 Q. B. 526.

(r) *Dowling v. Pontypool R. Co.*, L. R., 18 Eq. 714, where full plans accompany the report; 43 L. J., Ch. 761. Evidence was admitted to determine the extent of the lands delineated, but the evidence of engineers as experts on the construction of the plans was refused.

(s) *Id.* The value was 25*l.*

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should be applied for without delay, or the landowner will be met by a charge of acquiescence (*t*).

## Viaducts and tunnels.

R. C. Act, s. 18.

The power of deviation could not, under the earlier acts, be exercised at all upon lands on which viaducts or tunnels were intended to be made. For by sect. 13 of the Railways Clauses Act, 1845, it is enacted that where a viaduct is marked on the plan as intended to be made, it must be made accordingly (*u*); and where a tunnel is marked on the plan as intended to be made at any place, the same is required to be made accordingly, *unless the owners of the land shall consent* that the same shall *not* be so made. A tunnel might therefore be dispensed with by consent, but a viaduct could not. And by sect. 14, tunnels, among other engineering works, might not be deviated from, though in certain cases cuttings might be substituted for tunnels and embankments for viaducts, by permission of the Board of Trade; and the Court of Common Pleas decided in *Little v. Newport and Hereford R. Co.* (*x*), that the effect of these provisions, if unaffected by the special act, was, that where on the plan deposited in Parliament and referred to in the act, a tunnel is shown, there at that very place the tunnel must be made, unless dispensed with by consent, and that the power of deviation given by sect. 15, in ordinary cases, does not arise.

R. C. Act, 1863, s. 4.

But the difficulties caused by these provisions are now almost entirely (*y*) removed by the Railways Clauses Act, 1863, which provides (sect. 4), that—

## Power to alter engineering works,

if authorized by certificate of Board of Trade.

“Notwithstanding anything in the Railways Clauses Consolidation Acts respectively contained, the company, in the construction of the railway, may *deviate from the line* or level of any *arch, tunnel or viaduct*, described on the deposited plans or sections, so as the deviation be made within the limits of deviation shown on those plans, and subject to the limitations contained in sects. 11, 12, and 15 of those acts respectively, and so as the nature of the work described be not altered; and may also *substitute any engineering work not shown on the deposited plans or sections for an arch, tunnel or viaduct*, as shown thereon—*provided that every such substitution be authorized by a certificate of the Board of Trade; and the Board of Trade may grant such certificate in case it appears to them, on due inquiry, that the company has acted in the matter with good faith, and that the owners, lessees and occupiers of the lands in which the substitution is intended to be made consent thereto, and also that the safety and convenience of the public will not be diminished thereby: Provided that nothing in the present section shall affect any power given to the company, or to the Board of Trade by sects. 11, 12, 14 or 15 of the last-mentioned acts respectively.*”

## Branch line.

Lands within the limits of deviation may be taken for the purpose of forming a branch railway, although the main line has been pre-

(*t*) *Hopkins v. Great Northern R. Co.*, 11 L. T., O. S. 306.

(*u*) See *Attorney-General v. Tewkesbury and Malvern R. Co.*, 32 L. J., Ch. 482; 1 De G., J. & Sm. 423; 8 L. T. 196, 682.

(*x*) 22 L. J., C. P. 89; 12 C. B. 752. By the Commons' Standing Orders, Nos.

53 and 64 (1876), tunnels and viaducts are required to be shown on the plans and sections.

(*y*) The Act of 1863 applies only to railways authorised by acts incorporating it.

viously completed, inasmuch as the Railways Clauses Act, 1845, s. 16, contains a power authorizing the making of "permanent ways," and the effect of this provision is not affected by sect. 45, which applies to such lands for additional conveniences, as the owner may be willing to sell (z).

A question has arisen as to the right of the company to take lands beyond the limits of the lines of deviation, as laid down in the plans, in cases where the lands sought to be obtained have been numbered and described in the books of reference, although they were not within the lines of deviation. The decisions (a) show that in certain cases the company may use such lands, if they are necessary for the purpose of forming stations, or other works of a similar character described in sect. 16 (post, p. 352). It may, however, be doubtful whether these decisions can be applied to the extent of authorizing a company to take lands beyond the limits of deviation, unless it appears that the object is to carry into effect the declared purposes of the special act (b).

When lands beyond limits of deviation may be taken.

If the special act prohibits the company from entering upon or taking lands without the consent of the owner, it is then in the power of one individual to stop the progress of the undertaking, although the special act may specifically point out the intended course of the railway. Thus, where a statute authorized a company to form their railway by a certain line over lands described, and a subsequent section provided that nothing in the act should authorize the company to enter into or take or damage the lands or effects of any corporation or person whomsoever, without his consent in writing, it was decided that it was competent for a rival company to refuse to allow their railway to be crossed, although the effect of such a construction of the statute was to prevent the undertaking from being carried into execution (c).

Where owner's consent required.

It appears also that a railway company cannot sell part of the soil of their line after it is opened for public traffic, unless by express powers contained in an act of Parliament. Thus, where a railway company were authorized by their act to cross the line of another

The soil of another railway cannot be purchased, except under express powers.

(z) *Sadd v. Maldon R. Co.*, 6 Exch. 143; 20 L. J., Ex. 102.

(a) *Cotter v. Midland R. Co.*, 2 Phil. 469; post, p. 374, *Crawford v. Chester and Holyhead R. Co.*, 11 Jur. 917; *Richards v. Scarborough Market Co.*, 28 L. J., Ch. 110. So in *Doe d. Armistead v. North Staffordshire R. Co.*, 20 L. J., Q. B. 249; 16 Q. B. 528, a small portion of land beyond the limits of deviation was held to be properly taken by the company; but in that case there had been a notice given by the owner, which fact is relied upon in the judgment.

(b) It will be seen that, in *Cotter v. Midland R. Co.*, ubi supra, the act was passed, and the lands were required, for the purposes of an extension. And in *Crawford v. Chester and Holyhead R. Co.*, ubi supra, for the purposes of an additional station.

(c) *Clarence R. Co. v. Great North of England, Clarendon and Hartlepool Junction R. Co.*, 4 Q. B. 46; *S. C.*, in equity, 2 Railw. Cas. 783. See also *Gray v. Liverpool and Eury R. Co.*, 9 Beav. 391; 10 Jur. 384.

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company and to purchase lands for that purpose, and they accordingly gave a notice to the latter company to treat for certain lands adjoining to the railway, but it was insisted that the company giving the notice to treat were bound to purchase the soil on which the railway was actually constructed at the point of crossing as well as the lands on each side of that railway; upon an application for a mandamus, it was decided that the acts gave no power to one company to sell, or to the other company to purchase, any part of the soil of the line of the intersected railway (d).

Junctions with  
existing lines  
of railway.

So where a company had power "to make and maintain the railway and works on the line and upon the lands delineated in the parliamentary plan, and described in the books of reference, and to enter upon, take and use the lands, or such of them as should be necessary for that purpose;" but they were not to enter upon, take or use any of the land or property of a certain pre-existing company, or in any manner to alter, vary or interfere with that railway, or any of the works appertaining thereto, save only for the purpose of effecting the junction, in manner in the act authorized, and not otherwise; and by another clause in the act, certain powers were given to the company for effecting a junction with the pre-existing railway: Kindersley, V.-C., was of opinion that the construction of the act was, that if it was absolutely necessary for the construction of the railway and for the purpose of effecting a junction, to purchase the plaintiff's lands, then it gave powers for that purpose,—but that assumed that the junction could not be effected without purchasing; but his Honour being of opinion that there was no ground for assuming that the junction could not be effected without making a purchase, he decided that the company had a right of easement only over the plaintiff's line, so as to effect the junction (e).

Where a special act provided that nothing therein contained should be construed to prevent any owner or occupier of any land through which the railway might pass from carrying any railway or other road, which such owner or occupier was authorized to make in his lands, across the main railway, within his own land, it was decided in the House of Lords that this provision enabled the owner of land

(d) *R. v. South Wales R. Co.*, 6 Railw. Cas. 489; 19 L. J., Q. B. 272; 14 Q. B. 902. See also Railways Clauses Act, 1863, 26 & 27 Vict. c. 92, s. 10, infra; *Dublin and Drogheda R. Co. v. Navan and Kingscourt R. Co.*, note (k), infra. As to the ad valorem duty payable on conveyance, where transfer authorized by act of Parliament, see *Furness R. Cos v. Commissioners of Inland Revenue*, 33 L. J., Ex. 173.

(e) *Oxford, W. and W. R. Co. v. South Staffordshire R. Co.*, 1 Drew. 263. See also *Manchester, Sheffield and Lincolnshire R. Co. v. Great Northern R. Co.*, 9 Hare, 281, where a similar question was raised before Turner, V.-C., who granted an injunction to restrain the defendants from taking by compulsion a portion of the plaintiffs' railway, for the purpose of crossing it, and in the meantime a case was sent to a Court of law.

on one side of the railway to make a railway across the main railway and over lands on the other side, of which he had become lessee since the passing of the act, because the clause was obviously intended for the convenience of those who might be occupiers, or from time to time become occupiers, of the land, partly on one side and partly on the other side of the principal railway, and that without reference to the title under which the lands might be held (*f*).

Junctions with existing lines of railway.

So where a canal act authorized the proprietors of any mines of coal, within certain parishes, to make any railway or roads to convey their coals to the intended canal, over the lands of any person, first paying satisfaction for damages, &c., it was held that this power to make railways extended to persons who became proprietors of coal-mines subsequently to the passing of the act; and that such proprietors were empowered to make railways to be traversed by locomotive engines, though such engines were not in use when the act passed (*g*).

And a railway company have been held bound to afford facilities to another railway company to form a junction with their line, although the latter company were not entitled to purchase the land, and their powers of compulsory purchase of land had expired; and an injunction was granted by Parker, V.-C., to restrain the defendants from interfering with the plaintiffs in making a junction (*h*).

The Railways Clauses Act, 1863, Part I., contains special provisions of importance with respect to junctions between railways (*i*). Thus it is provided, that all interferences with the works of the railway with which the junction is authorized must be made to the satisfaction of the engineer of the company to whom that railway belongs: (Sect. 9.) For the purposes of the junction (*k*) an easement only is acquired, and such easement may be sold by the one company to the other: (Sect. 10.) The company with whose line the junction is made erect and work the signals, while the expenses of working them are to be repaid half-yearly by the company making the junction: (Sect. 12.) To sustain an action for these expenses, proof must be given that they have been actually paid, and the mere proof that a liability has been incurred in respect of them is not enough (*l*).

Working of signals, &c., at junctions.  
R. C. Act, 1863.

(*f*) *Monkland and Kirkcintilloch R. Co. v. Dixon*, 3 Railw. Cas. 273.

(*g*) *Bishop v. North*, 11 M. & W. 418; 3 Railw. Cas. 459; and see *Furrow v. Vansittart*, 1 Railw. Cas. 602, and *Dand v. Kingsrote*, 2 Railw. Cas. 27.

(*h*) *G. N. R. Co. v. East and West India Docks, &c. R. Co.*, 7 Railw. Cas. 356.

(*i*) 26 & 27 Vict. c. 92, ss. 9—12.

(*k*) The words "purposes of the junction" include the formation of all works necessary for the junction. *Dublin and Drogheda R. Co. v. Navan and Kingscourt R. Co.*, 5 Ir. R. Eq. 393.

(*l*) *Cuermarton and Cardigan R. Co. v. Manchester and Milford R. Co.*, L. R., 8 C. P. 685; 42 L. J., C. P. 262.

2. General Powers to Construct Railway.

General powers to construct railway and works.

R. O. Act, s. 16.

2. General Powers to construct Railway and Works.

These powers are of a very extensive nature. The special act ordinarily empowers the company to "make and maintain" the railway "with all proper stations, approaches, works, and conveniences connected therewith—a power which includes reasonable improvements, such as stone steps in a station-yard (m); and the 16th section of the Railways Clauses Act, 1845, enacts that "subject to the provisions and restrictions in that act and the special act contained, or in any act incorporated therewith (n), it shall be lawful for the company, for the purpose of constructing the railway (o), or the accommodation works connected therewith," to execute any of the following works:—

Inclined planes, &c.

"They may make or construct in, upon, across, under or over any lands, or any streets, hills, valleys, roads, railroads, tramroads, rivers (p), canals, brooks, streams or other waters, within the lands described in the said plans, or mentioned in the said books of reference, or any correction thereof, such temporary or permanent inclined planes, tunnels (q), embankments, aqueducts, bridges, roads (r), ways (s), passages, conduits, drains, piers, arches (t), cuttings and fences, as they think proper (u):

Alteration of course of rivers, &c.

"They may alter the course of any rivers not navigable, brooks, streams or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water (x), roads (y), streets or ways, or raise or sink the level of any such rivers or streams, roads, streets or ways, in order the more conveniently (z) to carry the same over or under or by the side of the railway, as they may think proper :

Drains, &c.

"They may make drains or conduits into, through or under any lands adjoining the railway, for the purpose of conveying water from or to the railway (a):

Warehouses, &c.

"They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus and other works and conveniences as they think proper."

General power.

It is further provided by the same section, that the company "may do all other acts necessary for making, maintaining, altering or re-

(m) *Severnocks, &c. R. Co. v. L. C. & D. R. Co.*, L. R., 11 Ch. D. 625.

(n) This includes the Lands Clauses Act. *Rangeley v. Midland R. Co.*, 37 L. J., Ch. 313; L. R., 8 Ch. 306.

(o) See *R. v. Wycombe R. Co.*, 36 L. J., Q. B. 121, and post.

(p) See further, *Mayor, &c. of Norwich v. Norfolk R. Co.*, 4 E. & B. 397. As to the bridges over navigable tidal waters, see sect. 5, post.

(q) If a permanent tunnel be made, the company must purchase the land. *Ramsden v. Manchester and Altrincham L. Co.*, 1 Ex. 723.

(r) See as to a temporary ballast line, *Sheraby v. South Eastern R. Co.*, 13 Jur. 689; and as to permanent diversion of road, *Phillips v. London, Brighton and South Coast R. Co.*, 4 Giff. 46.

See *Sadd v. Maldon and Brentree*

*R. Co.*, 6 Ex. 18; 20 L. J., Ex. 102.

(t) If an arch be made, the company must purchase the land. *Pinchin v. London and Blackwall R. Co.*, 1 Kay & J. 34.

(u) See the cases as to bridges, collected, post, p. 32; as to roads, p. 339.

(x) See *Abraham v. Great Northern R. Co.*, 16 Q. B. 586; *Pugh v. Golden Valley R. Co.*, L. R., 12 Ch. D. 274.

(y) If a railway company divert a road, and substitute a new one, the soil of the old road reverts to the owner, discharged of the easement. *Marquis of Salisbury v. Great Northern R. Co.*, 28 L. J. C. P. 40.

(z) See *Attorney-General v. Ely, &c. R. Co.*, 37 L. J., Ch. 822; L. R., 6 Eq. 106; affirmed on appeal, 38 L. J., Ch. 253; L. R., 4 Ch. 194.

(a) As to powers of Drainage Commissioners in Ireland, see ss. 25—29.

pairing and using the railway: " *provided always* (b), that they do as little damage as can be, and make full satisfaction, &c., to all parties interested for all damage by them sustained by reason of the exercise of the statutory power (c).

Provido as to damages.

The powers given by this section can only be exercised so far as is necessary for the construction of the railway; an exercise of such powers merely for the purpose of saving expense is an illegitimate exercise of them (d).

Powers may not be exercised merely to save expense.

*Pugh v. Golden Valley R. Co.*

It follows, that if a company carry on their works in such a way as to cause more damage than the necessity of the case requires, a court of equity will restrain them; for, although the company are not to be prevented from doing anything which is necessary to the due prosecution of their undertaking, they may not, on the other hand, prosecute it in such a manner as to do unnecessary damage to others. Thus, where a railway company were proceeding to erect an arch over a mill-race, for the purpose of sustaining an embankment on which the railway was to be constructed, and it appeared that injury would be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions, an injunction was granted to restrain the company from making over the mill-race an arch of less than certain specified dimensions (e), but a company whose line crosses a stream, may in the exercise of their rights as riparian owners, abstract a reasonable quantity of water, although the working of a mill may be thereby shortened for a few minutes a day (f). So where a company neglected to take sufficient precautions to secure the safety of an adjoining house, the Court granted an injunction, and also an inquiry as to damages (g).

Injunction to restrain company from unnecessary damage.

MILL.

Securing safety of house.

The special act sometimes gives power to the company to underpin houses within 100 feet of the railway, giving ten days' notice to occupiers, and also paying them compensation (h).

Underpinning house.

(b) This proviso does not control the provisions in sect 60 (post, p. 357), as to the rate of the ascent of a road, and other similar provisions in the act. The words used do not apply to what is done, but to the manner of doing it—the *modus operandi*; and compensation is to be made for the damage. *R. v. E. and W. India Docks, &c. R. Co.*, 22 L. J., Q. B. 380; 2 E. & B. 468.

(c) Therefore parties injured must seek compensation, and cannot bring actions unless they sustain special damage. sect. 65; *Watkins v. Grosvenor Co.*, 18 Q. B. 961; *Tar R. Co.*, 5 E. & B. 61.

(d) *Reg. v. IV* Q. B. 310; 36 with approval by.

*wick v. East London R. Co.*, L. R., 20 Eq. 544, and with disapproval by Fry, J., in *Pugh v. Golden Valley R. Co.*, L. R., 12 Ch. D. 274; affirmed by Court of Appeal in *Pugh v. Golden Valley R. Co.*, L. R., 15 Ch. D. 330; 49 L. J., Ch. 728.

(e) *Coats v. Clarence R. Co.*, 1 Russ. & M. 181; see also *Maner v. Northern and Eastern R. Co.*, 2 Railw. Cas. 380.

(f) *Sandwich (Earl of) v. Great Northern R. Co.*, L. R., 10 Ch. D. 707; 49 L. J., Ch. 22.

*A. Co.*, L. R.,

Way Act, 1874,  
District Railway  
*vs. v. Metropolitan*  
29 Ch. D. 60.



2. *General Powers to Construct Railway.*

Indictment or information.

Disturbance of market rights by depot at station.

Special constables.

1 & 2 Vict. c. 80.

It is also settled that a railway company is amenable to indictment (*i*), as well as by information at the instance of the Attorney-General (*k*), if their works are not made conformably to the powers contained in the statutes.

In the very peculiar case of *Goldsmid v. Great Eastern R. Co.* (*l*) the defendants who had established a dépôt at their terminus within 300 yards of a chartered market, and had let the dépôt to tenants with the exclusive right of selling vegetables brought up by their railway, were restrained from using it in such manner as to interfere with the rights of the plaintiff in the chartered market.

If the appointment of special constables be occasioned by the behaviour, or reasonable apprehension of the behaviour, of the persons employed by the company to construct the railway, justices of the peace may make orders upon the company for the payment of the constables. A secretary of state has power to disallow such orders, and they are binding on the company only if allowed by him (*m*). The making of such an order is a judicial proceeding, so that the company is entitled to be heard before the order is made, and an order made without such hearing will be quashed (*n*). It seems that the special constables may be employed, although the Board of Trade has authorized the opening of the line for traffic (*o*).

3. *Deviations from Datum Line.*

### 3. *Deviations from Datum Line.*

The general powers conferred upon railway companies by the Railways Clauses Act are restrained by provisions requiring that certain engineering works connected with the railway shall be executed in a specified manner.

Deviations from datum line described in sections, &c.

R. C. Act, s. 11.

Thus, by sect. 11, in making the railway, the company may not deviate from the levels of the railway as referred to the common datum line (*p*) described in the section approved of by Parliament, and as marked on the same, to any extent exceeding in any place 5 feet, or in passing through a town, village, street or land continuously built upon 2 feet, without the previous consent in writing of the owners and occupiers of the land in which such deviation is intended to be made (*q*). If any street or public highway be

Deviation affecting highway.

(*i*) *R. v. Great North of England R. Co.*, 9 Q. B. 815.

(*k*) See 7 & 8 Vict. c. 85, s. 17.

(*l*) L. R., 25 Ch. D. 511—C. A.

(*m*) 1 & 2 Vict. c. 80, post, Appendix.

(*n*) *Reg. v. Cheshire Lines Committee*, L. R., 8 Q. B. 344; 42 L. J., M. C. 100.

(*o*) *North British R. Co. v. Horns*, 5 Railw. Cas. 281.

(*p*) See *North British R. Co. v. Tod*, ante, p. 339.

(*q*) As to mandamus to company to construct their works in conformity with their powers, see *R. v. E. and W. India Docks, &c. R. Co.*, 2 E. & B. 466.

affected by such deviation, then the same "shall not be made" without the like consent of the trustees or commissioners having the control thereof, or of two or more justices of the peace in petty sessions assembled for that purpose, and acting for the district in which such street or public highway may be situated, or without the like consent of the commissioners for any public sewers, or the proprietors of any canal, navigation, gasworks or waterworks affected by such deviation. The company, however, may deviate from the said levels to a further extent without such consent as aforesaid, by lowering solid embankments or viaducts, provided that the requisite height of headway, as prescribed by act of Parliament, be left for roads, streets or canals passing under the same. Fourteen days' notice of every petty sessions to be held for obtaining the required consent of justices must be given in some newspaper circulating in the county, and a like notice must be affixed upon the door of the parish church in which the deviation is intended to be made.

Consent of justices, &c.

Notice of petty sessions.

Before the company may make any greater deviation from the level than 5 feet, or in any town, &c., 2 feet, they must give notice of the intended deviation by public advertisement, inserted once at least in two local newspapers, or twice at least in one local newspaper, three weeks at least before commencing to make the deviation; and the owner of any lands prejudicially affected thereby (r), at any time before the commencement of the making of such deviation, may apply to the Board of Trade, after giving ten days' notice to the company, to decide whether such proposed deviation is proper to be made; "and it shall be lawful for the Board of Trade, if they think fit," to decide such question accordingly, and, by certificate either to disallow or to authorize the deviation, either simply or with modifications. If a certificate be given, "it shall not be lawful" for the company to make the deviation, except in conformity therewith.

Public notice to be given previous to making greater deviations.  
Sect. 12.

Certificate of Board of Trade.

As to arches, viaducts and tunnels, and the change in the law effected by the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 4, see p. 348, *ante*.

Arches, viaducts, tunnels.

The company may not deviate from or alter the gradients, curves, tunnels or other engineering works (s) described in the plan or section, except within certain limits prescribed by the 14th section, as follows:—

Gradients and curves.  
R. C. Act, s. 14.

"Subject to the above provisions in regard to altering levels, it shall be lawful for the company to diminish the inclination or gradients of the railway to any

Gradients.

(r) See *Pearce v. Wycombe R. Co.*, 1 Drew. 244.

(s) This applies only to the line of the railway and not to cross roads. *R. v. Caledonian R. Co.*, 20 L. J., Q. B. 147;

*Beardner v. L. & N. W. R. Co.*, 1 Macn. & G. 112; *ante*, p. 343. And would include bridges; *Attorney-General v. Tewkesbury and Malvern R. Co.*, 32 L. J., Ch. 482.

8. *Deviation from Datum Line*

extent, and to increase the said inclination or gradients as follows; (that is to say,) in gradients of an inclination not exceeding one in a hundred, to any extent not exceeding ten feet per mile, or to any further extent which shall be certified by the Board of Trade to be consistent with the public safety, and not prejudicial to the public interest; and in gradients of or exceeding the inclination of one in a hundred, to any extent not exceeding three feet per mile, or to any further extent which shall be so certified by the Board of Trade as aforesaid (t).

Curves.

"It shall be lawful for the company to diminish the radius of any curve described in the said plan, to any extent which shall leave a radius of not less than half a mile, or to any further extent authorized by such certificate as aforesaid from the Board of Trade.

Tunnels.

"It shall be lawful for the company to make a tunnel, not marked on the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorized by such certificate as aforesaid from the Board of Trade."

4. *Bridges.*

Sect. 4. *Bridges over or under Roads.*

Crossing of roads,  
Sect. 46.

With respect to the crossing of roads, or other interference therewith, it is enacted, "that if the line cross any turnpike road or public highway, then (except where otherwise provided by the special act (u)), either the road shall be carried over the railway, or the railway over the road, by means of a bridge, to be executed, and at all times thereafter maintained, at the expense of the company. But it is provided, that with the consent of two or more justices in petty sessions, the company may carry the railway across any highway other than a public carriage-road on the level:" (Sect. 46.)

On a level.

This section gives the company an option of carrying the road over the railway, or the railway over the road, as they may think fit, without reference to the level of the line of the railway; and it seems also that the company may, under sect. 16, alter such works, after they have once exercised the option given by the above section. On this ground a writ of mandamus was held to be bad, which commanded a company to carry a road over a highway by means of a bridge, that being the only way in which, according to the level of the line of the railway at the time the writ was applied for, the road <sup>known</sup> ~~should~~ be preserved (v). If the road is carried *over* the railway, the <sup>any</sup> place imposes on the company the burden of the perpetual maintenance, <sup>and</sup> ~~only~~ of the fabric of the bridge and approaches, but of the road <sup>writing</sup> ~~itself~~ over the bridge and approaches (x). But if the road is carried <sup>ation</sup> ~~itself~~ is

(t) See *Attorney-General v. Mid Kent R. Co.*, L. R., 3 Ch. 100.

(u) See *Warden, &c. of Dover Harbour v. London, Chatham and Dover R. Co.* 30

road over the railway by a bridge refused.

(v) *South Eastern R. Co. v. R.*, 20 L. J., 5. O. B. 428: 17 O. B. 485: 17 Jur. 9.

the railway, the company are not bound to keep the road in repair (y).

Every bridge carrying the railway over a road must be built as follows :—

Bridge over roads.  
R. C. Act, s. 49.

"The width of the arch shall be such as to leave thereunder a clear space of not less than 35 feet if the arch be over a turnpike road, and of 25 feet if over a public carriage-road, and of 12 feet if over a private road (z) :

Width of arch.

"The clear height of the arch from the surface of the road shall not be less than 16 feet for a space of 12 feet if the arch be over a turnpike road, and 15 feet for a space of 10 feet if over a public carriage-road ; and in each of such cases the clear height at the springing of the arch shall not be less than 12 feet :

Height of arch.

"The clear height of the arch, for a space of 9 feet shall not be less than 14 feet over a private carriage-road :

"The descent made in the road, in order to carry the same under the bridge, shall not be more than one foot in 30 feet, if the bridge be over a turnpike-road ; one foot in 20 feet if over a public carriage-road ; and one foot in 16 feet if over a private carriage-road, not being a tramroad or railroad ; or, if the same be a tramroad or railroad, the descent shall not be greater than the prescribed rate of inclination ; and if no rate be prescribed, the same shall not be greater than as it existed at the passing of the special act : " (Sect. 49.)

Descent in road.

Every bridge carrying a road over the railway must be built as follows (u) :—

Bridge over railway.  
Sect. 50.

"There shall be a good and sufficient fence (b) on each side of the bridge of not less height than 4 feet, and on each side of the immediate approaches of such bridge of not less than 3 feet.

Fence.

"The road over the bridge shall have a clear space between the fences thereof of 35 feet if the road be a turnpike-road, and 25 feet if a public carriage-road, and 12 feet if a private road.

Width.

"The ascent shall not be more than one foot in 30 feet if the road is a turnpike-road ; one foot in 20 feet if a public carriage-road ; and one foot in 16 feet if a private carriage-road, not being a tramroad or a railroad ; or, if the same be a tramroad or railroad, the ascent shall not be greater than the prescribed rate of inclination, and if no rate be prescribed, the same shall not be greater than as it existed at the passing of the special act " (s. 50).

Steepness.

But it is *provided*—(1) that in all cases where the average available width for the passage of carriages of any existing roads, within fifty yards of the points of crossing the same, is less than the width prescribed for bridges under or over the railway, the width of such

Width of bridges need not exceed width of road in certain cases.  
Sect. 51.

(y) *Waterford and Limerick R. Co. v. Kearney*, 12 Ir. C. L. R. 224 ; *Fosberry v. Same Co.*, 13 Ir. C. L. R. 494 ; *L. and N. W. R. Co. v. Skerton*, 33 L. J., M. C. 158 ; 5 B. & S. 559.

(z) These dimensions are to be taken irrespective of the footpaths at the sides of the roads. *R. v. Riggby*, 19 L. J., Q. B. 153 ; 14 Q. B. 687. Where a company, by agreement with a land-owner, agree to erect a suitable bridge over a street as

company to strengthen an existing bridge pointed out in the plans, and the company took down the bridge and rebuilt it, it was held by Lord Cottenham, C., that they were justified in doing so. *Wood v. North Staffordshire R. Co.*, 1 Macn. & Gowl. 278.

(b) See *Lay v. Midland R. Co.*, 30 L. T. 529 ; 34 L. T. 30, where a boy of four or five years of age, who had been injured by falling through the open ornamental work of a bridge was first held not entitled and

8 Demotions  
from Datum Line

extent, and to increase the said inclination or gradients as follows; (that is to say,) in gradients of an inclination not exceeding one in a hundred, to any extent not exceeding ten feet per mile, or to any further extent which shall be certified by the Board of Trade to be consistent with the public safety, and not prejudicial to the public interest; and in gradients of or exceeding the inclination of one in a hundred, to any extent not exceeding three feet per mile, or to any further extent which shall be so certified by the Board of Trade as aforesaid (t).

Curves.

"It shall be lawful for the company to diminish the radius of any curve described in the said plan, to any extent which shall leave a radius of not less than half a mile, or to any further extent authorized by such certificate as aforesaid from the Board of Trade.

Tunnels.

"It shall be lawful for the company to make a tunnel, not marked on the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorized by such certificate as aforesaid from the Board of Trade."

#### 4. Bridges.

#### Sect. 4. *Bridges over or under Roads.*

Crossing of  
roads.  
Sect. 46.

With respect to the crossing of roads, or other interference therewith, it is enacted, "that if the line cross any turnpike road or public highway, then (except where otherwise provided by the special act (u)), either the road shall be carried over the railway, or the railway over the road, by means of a bridge, to be executed, and at all times thereafter maintained, at the expense of the company. But it is provided, that with the consent of two or more justices in petty sessions, the company may carry the railway across any highway other than a public carriage-road on the level:" (Sect. 46.)

On a level.

This section gives the company an option of carrying the road over the railway, or the railway over the road, as they may think fit, without reference to the level of the line of the railway; and it seems also that the company may, under sect. 16, alter such works, after they have once exercised the option given by the above section. On this ground a writ of mandamus was held to be bad, which commanded a company to carry a road over a highway by means of a bridge, that being the only way in which, according to the level of the line of the railway at the time the writ was applied for, the road could be preserved (r). If the road is carried over the railway, the company imposes on the company the burden of the perpetual maintenance and only of the fabric of the bridge and approaches, but of the road over the bridge and approaches (x). But if the road is carried under the railway by a bridge

(t) See *Attorney-General v. Mid Kent R. Co.*, L. R., 3 Ch. 100.

(u) See *Warden, &c. of Dover Harbour v. London, Chatham and Dover R. Co.*, 30 L. J., Ch. 474, where it was held that a special act, which authorized the company to cross a road on a level, provided they made a bridge for foot passengers, was permissive and not compulsory, and an injunction to prevent their carrying the

road over the railway by a bridge refused.

(r) *South Eastern R. Co. v. R.*, 20 L. J. B. 428; 17 Q. B. 485; 17 Jur. 94 H. L. Cas. 171.

(x) *North Staffordshire R. Co. v. Dr. Lench v. North Staffordshire R. Co.*, 8 E. & B. 836; 27 L. J., M. C. 14 L. J., M. C. 151.

*Horne, v. Tod*  
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the railway, the company are not bound to keep the road in repair (y).

Every bridge carrying the railway over a road must be built as follows :—

Bridge over  
roads.

R. C. Act, s. 49.

"The width of the arch shall be such as to leave thereunder a clear space of not less than 35 feet if the arch be over a turnpike road, and of 25 feet if over a public carriage-road, and of 12 feet if over a private road (z) :

Width of arch.

"The clear height of the arch from the surface of the road shall not be less than 16 feet for a space of 12 feet if the arch be over a turnpike road, and 15 feet for a space of 10 feet if over a public carriage-road ; and in each of such cases the clear height at the springing of the arch shall not be less than 12 feet :

Height of arch.

"The clear height of the arch, for a space of 9 feet shall not be less than 14 feet over a private carriage-road :

"The descent made in the road, in order to carry the same under the bridge, shall not be more than one foot in 30 feet, if the bridge be over a turnpike-road ; one foot in 20 feet if over a public carriage-road ; and one foot in 16 feet if over a private carriage-road, not being a tramroad or railroad ; or, if the same be a tramroad or railroad, the descent shall not be greater than the prescribed rate of inclination ; and if no rate be prescribed, the same shall not be greater than as it existed at the passing of the special act : " (Sect. 49.)

Descent in road.

Every bridge carrying a road over the railway must be built as follows (a) :—

Bridge over  
railway.

Sect. 50.

"There shall be a good and sufficient fence (b) on each side of the bridge of not less height than 4 feet, and on each side of the immediate approaches of such bridge of not less than 3 feet.

Fence.

"The road over the bridge shall have a clear space between the fences thereof of 35 feet if the road be a turnpike-road, and 25 feet if a public carriage-road, and 12 feet if a private road.

Width.

"The ascent shall not be more than one foot in 30 feet if the road is a turnpike-road ; one foot in 20 feet if a public carriage-road ; and one foot in 16 feet if a private carriage-road, not being a tramroad or a railroad ; or, if the same be a tramroad or railroad, the ascent shall not be greater than the prescribed rate of inclination, and if no rate be prescribed, the same shall not be greater than as it existed at the passing of the special act " (s. 50).

Steepness.

But it is *provided*—(1) that in all cases where the average available width for the passage of carriages of any existing roads, within fifty yards of the points of crossing the same, is less than the width prescribed for bridges under or over the railway, the width of such

Width of bridges  
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Sect. 51.

(y) *Waterford and Limerick R. Co. v. Kearney*, 12 Ir. C. L. R. 224 ; *Fosberry v. Same Co.*, 13 Ir. C. L. R. 494 ; *L. and N. W. R. Co. v. Skerton*, 33 L. J., M. C. 158 ; 5 B. & S. 559.

(z) These dimensions are to be taken irrespective of the footpaths at the sides of the roads. *R. v. Bighy*, 19 L. J., Q. B. 153 ; 14 Q. B. 687. Where a company, by agreement with a land-owner, agree to erect a suitable bridge over a street as then planned, and the street was 42 feet wide, it was held that the arch of the bridge must be of the same width. *Clarke v. Manchester, Sheffield and Lincolnshire R. Co.*, 1 J. & H. 681.

(a) The special act required th

company to strengthen an existing bridge pointed out in the plans, and the company took down the bridge and rebuilt it, it was held by Lord Cottonham, C., that they were justified in doing so. *Wood v. North Staffordshire R. Co.*, 1 Macn. & Gurl. 278.

(b) See *Lay v. Milland R. Co.*, 30 L. T. 529 ; 34 L. T. 30, where a boy of four or five years of age, who had been injured by falling through the open ornamental work of a bridge, was first held not entitled and afterwards entitled, to recover from the company. It does not clearly appear from the report what evidence was given at the second trial.

4. Bridges. — bridges need not be greater than such average available width of such roads; but so, nevertheless, that such bridges be not of less width, in the case of a turnpike-road or public carriage-road, than 20 feet; and (2) that, if at any time after the construction of the railway, the average available width of any such road shall be increased beyond the width of such bridge on either side thereof, the company shall be bound, at their own expense, to increase the width (c) of the said bridge to such extent as they may be required by the trustees or surveyors of such roads not exceeding the width of such road as so widened, or the maximum width prescribed for a bridge in the like case over or under the railway: (Sect. 51.)
- Minimum width.
- Repair of bridges. By the 46th section of the Railways Clauses Act, the company are bound to maintain all bridges made by them under or over turnpike-roads or public highways; and by the 65th section of the same act, two justices may order bridges to be repaired upon the application of two householders, made after not less than ten days' notice to the company (d). The 65th section has been held to be incorporated by general words in a special act (e); and where the special act provided for the repair of a bridge by the trustees of a turnpike-road, and the turnpike trust had expired, it was decided that the 65th section, although expressly varied by the special act, revived on the expiration of the turnpike trust, so that an order to repair the bridge might be made under the 65th section (f). It is also expressly provided by the Annual Turnpike Acts Continuance Act, 1872, 35 & 36 Vict. c. 85, s. 13, that "such of the provisions of the Railways Clauses Consolidation Act, 1845, with respect to the crossing of roads and other interference therewith (g) as relate to turnpike roads shall continue in force in relation to any road, which having been a turnpike road, may at any time after the passing of that act [10th August, 1872] become an ordinary highway in the same manner as if such road had continued to be a turnpike-road"; and that "in the construction of the said provisions, when applied to any such road as aforesaid, if the road is within the jurisdiction of the highway board such highway board shall be deemed to be the trustees or commissioners thereof; and in other cases the surveyor or other local authority having the care of the road shall be deemed to be such trustees or commissioners."
- Repair of bridges, on expiration of turnpike trust.
- Crossing of dis-turnpiked roads.
- If other parties carry a bridge over the railway under an act binding them to repair the bridge, the obligation to repair will only

(c) See *R. v. Digby*, 14 Q. B. 687, post, p. 383.

(d) As to agreement with urban authority for adoption and maintenance of bridges, see Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 117.

(e) *Bristol and Exeter R. Co. v. Tucker*, 13 C. B., N. S. 207; 7 L. T. 461.

(f) *London, Chatham and Dover R. Co. v. Wandsworth District Board*, 42 L. J., M. C. 70.

(g) See also 18 & 19

arise upon the railway company giving notice to such parties ; and if the company do the repairs themselves without such notice, they will not be able to recover them (h).

It is also *provided*, that, if the mesne inclination of any road within 250 yards of the point of crossing the same, or the inclination of such portion of any road as may require to be altered, or for which another road shall be substituted, shall be steeper than the inclination required to be preserved by the company, then the company may carry any such road over or under the railway, or may construct such altered or substituted road, at an inclination not steeper than the said mesne inclination of the road so to be crossed, or of the road so required to be altered, or for which another road shall be substituted : (Sect. 52.)

Existing inclinations of roads crossed or diverted need not be improved.  
R. U. Act, s. 52.

If the company so use (i) any part of any road (j), public or private, as to render it impassable for, or dangerous, or extraordinarily inconvenient to the public, they are required, before the commencement of any operations, to cause a sufficient road to be made, instead of the road to be interfered with, and to maintain such road : (Sect. 53.) This section applies to a permanent as well as to a temporary diversion, and the road to be substituted must at any rate not be dangerous to use at any season of the year (k). In default of making the substituted road, the company are liable to a heavy penalty, payable to the trustees, &c., if a public road, or, in case of a private road, to the owner (l) ; and any person sustaining special damage, and no other person (m), may maintain an action against the company : (Sects. 54, 55.) If the road interfered with as above mentioned can be restored compatibly with the formation and use of the railway, the company are required to restore it to as good a condition as the same was in at the time when the same was first interfered with, or as near thereto as may be ; and if it cannot be restored, then the company are required to cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently

Before roads are interfered with others must be substituted.  
Sects. 53-56.

(h) *London and South Western R. Co. v. Flower*, L. R., 1 C. P. Div. 77 ; 33 L. T. 687.

(i) As to diversion and alteration, see sect. 16, ante, p. 352, and *Marquis of Salisbury v. Great Northern R. Co.*, 38 L. J., C. P. 40.

(j) This means other than that which is the subject of the powers of the special act ; therefore, where a special act authorized the conversion of a tramroad into a railway, the company were held not bound by this section to substitute another road during the conversion. *Tanner v. South Wales R. Co.*, 5 E. & B. 618.

(k) *Attorney-General v. Barry Docks*

and *Railway Co.*, L. R., 35 Ch. D. 573, per North, J., an injunction was suspended on condition of immediate danger being prevented, and till after an appeal, which was entered, but afterwards withdrawn.

(l) A tenant of a farm is not an owner within this provision. *Collinson v. Newcastle and Darlington R. Co.*, 1 Car. & Kir. 546. See the interpretation clause, sect. 3 ; see also *Mann v. Great Southern and Western R. Co.*, 9 Ir. C. L. R. 105.

(m) *Watkins v. Great Northern R. Co.*, 16 Q. B. 961 ; 20 L. J., Q. B. 391 ; *Tanner v. South Wales R. Co.*, 5 E. & B. 618.



4. Bridges.

substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow (n); and the former road must be restored, or the substituted road provided, within a certain period, which is prescribed, otherwise a penalty is incurred: (Sects. 56, 57.) If the company use or interfere with (o) any road, they are required from time to time to repair and make good all damage done by them; and in case of difference, two justices may decide the question in the manner prescribed (p): (Sect. 58.)

Extinguishment  
of footways.

Where the special act authorized the extinguishment of certain footways, it was held by the Court of Appeal that only public footways could be extinguished, and that a private right of way could not be interfered with (q).

5. Bridges over  
Tidal Waters.Spans of bridge.5. Bridges over Tidal Waters.

The Railways Clauses Act, 1863, 26 & 27 Vict. c. 92, contains a variety of provisions (Sects. 13—19) for the protection of the navigation of tidal waters from interruption by railway works. The act, which applies only if incorporated by the special act, is set out in vol. II. With regard to bridges over tidal waters, it is enacted by sect. 14 that they must be constructed with spans of such headway and waterway and with such opening span (if any) as the Board of Trade approves, and by sect. 15 that if there be an opening span, "it shall not be lawful for the company to detain any vessel, barge or boat at the bridge for a longer time than may be necessary for admitting a carriage or engine traversing the railway and approaching the bridge to cross the bridge, and for opening the bridge to admit the vessel, barge or boat to pass," the company being also subject to Board of Trade regulations as to user of the bridge, and to a penalty of £20

(n) An information may be filed if this provision is disregarded. See, as to injunction in such a case, *Attorney-General v. London and South Western R. Co.*, 3 De G. & S. 439.

(o) Where a railway company used roads by the carriage of stone and other materials over them for making the railway and works, and in the opinion of two justices thereby damaged the road, it was held by the Court of Queen's Bench that they were liable, under sect. 58, to make good the damage, although the materials were really conveyed in the carts of contractors and others employed by them. *West Riding and Grimsby R. Co. v. Wakefield Local Board of Health*, 33 L. J., M. C. 174.

(p) As to what is a good conviction

under this section, see *L. and N. W. R. Co. v. Wetherall*, 20 L. J., Q. B. 337; 15 Jur. 247. Where a railway company pulled down a county bridge and erected another, and agreed with the trustees of a turnpike road to keep the approaches to the bridge in repair, which had been previously repaired by the county, and the road became out of repair, *Wightman, J.*, refused to grant a mandamus calling upon the company to repair the road, as it was not a use of the road within 8 & 9 Vict. c. 20, s. 58. The proper course was for the trustees, if they were compelled to repair the road, to avail themselves of their remedy on the agreement. *Ex parte Exeter Road Trustees*, 16 Jur. 669.

(q) *Wells v. London, Tilbury and South-end R. Co.*, L. R., 5 Ch. D. 126.

for detaining any vessel, &c. longer than the proper time. If the mast of a vessel can be sufficiently lowered, a refusal to open the span is not a detention within the 15th section (r).

6. *Level Crossings, and Accidents at Level Crossings.*

6. *Level Crossings.*

By the General Highway Act, 5 & 6 Will. 4, c. 50, s. 71, it was provided, that whenever a railroad should cross "any *highway for carts or carriages*," the proprietors of the railroad should make and maintain gates at each of the crossings, and employ proper persons to open and shut them.

But that act not applying to turnpike roads, the law was extended by 2 & 3 Vict. c. 45 (s), which, enacted, that whenever a railroad should cross "any *turnpike-road, or any highway or statute labour road for carts or carriages* in Great Britain," the proprietors of the railroad should make and maintain gates across each end of the road, and employ proper persons to open and shut them.

2 & 3 Vict. c. 45.

By 5 & 6 Vict. c. 55, s. 9 (t), after reciting 2 & 3 Vict. c. 45, and that by the acts relating to certain railways it was provided that such gates should be kept closed *across the railway*, except when trains were passing, it was enacted that such gates should be kept closed *across each end of such turnpike or other roads* in lieu of across the railway (except when horses, &c. had to cross the railway), with a proviso enabling the Board of Trade to make alterations, if necessary.

5 & 6 Vict. c. 55, s. 9.

None of these acts, however, apply to a railway constructed by a private owner without the authority of an act of Parliament, and where a horse strayed along a turnpike road on to a private railway by a level crossing unprotected by gates, and so was killed by a train, it was held by the House of Lords that the owner of the horse could recover nothing from the owners either under the statutes or at common law (u).

Private railway is unaffected by Highway Acts.

It is material to observe that the 46th section of the Railways Clauses Act, 1845, without repealing the above provisions, prohibits level crossings in general, by enacting when the line of railway crosses any turnpike-road or public highway, then (except where otherwise provided by the special act) either the road must be carried

Prohibition of level crossings in general.  
R. C. Act, s. 40.

(r) *West Lancashire R. Co. v. Iddon*, 40 L. T. 600.

(s) See vol. II. Complaints under this act must be made within one calendar month after neglect.

(t) See *Fawcett v. York and North Mid-*

*land R. Co.*, 16 Q. B. 610; 20 L. J., Q. B. 222; *Dickinson v. L. & N. W. R. Co.*, 1 Harr. & Ruth. 899.

(u) *Matson v. Baird*, L. R., 3 App. Cas. 1082.

6. Level Crossings

over the railway (*n*), or the railway over the road, by a bridge (*c*),—with a proviso that, with the assent of two or more justices, the company may carry the railway across any *highway other than a public carriage-road* on the level.

Authorization of level crossings over carriage-roads by special act.

Level crossings, therefore, over public carriage-roads can only be made, if at all, under the authority of a special act. The Standing Orders of both Houses contain various provisions (*y*) with respect to level crossings of this kind. And it is directed, in particular, that "in every clause authorizing a level crossing the number of lines of rails authorized to be made at such crossing shall be specified" (*z*).

Application to justices to sanction level crossing over highway not being carriage-road.

Sects. 59–62.

When it is intended to apply to the justices for their assent to a level crossing over a highway which is not a carriage-road, fourteen days' public notice of such intended application must be given; and any party aggrieved by the determination of the justices may appeal to the sessions, who may finally determine the question and award costs: (Sects. 59, 60.) If the railway cross any highway other than a public carriage-way on the level, the company must, at their own expense, make and at all times maintain convenient ascents and descents, and other convenient approaches, with handrails or other fences, and must, if the highway be a bridleway, erect and maintain sufficient gates, and, if it be a footway, sufficient gates or stiles, on each side of the railway: (Sect. 61.) If the company fail to do so, two justices, on application of the surveyor of roads, or two householders, may, after ten days' notice to the company, order them to execute such works under a penalty of 5*l.* a day, and the justices may apply the penalty in executing the works: (Sect. 62.)

Gates across road, where level crossing over carriage-road.

The Railways Clauses Act contains also two sections (47 and 48) applicable to cases in which the special act allows level crossings over carriage-roads. Section 47, which appears to be a substitution for the previous statutory provisions already noticed (*a*), than which it is somewhat more extensive, provides that if the railway cross any turnpike-road or public carriage-road on a level the company shall erect and maintain gates across such road, and employ proper persons to open and shut such gates, and such gates are to be kept closed *across the road* (except when horses, &c. want to cross the railway) under a penalty of 40*s.* on the *person in charge* of the gate. This section also gives power to the Board of Trade to order that the gates shall be kept closed *across the railway*.

(*n*) Sect. 59 contains regulations as to the height, &c. of the bridge.

(*z*) Sect. 49 contains regulations as to the height, &c. of the bridge.

(*y*) O. S. O. 81, 82, 155, 157; L. S. O. 50, 51, 112. See vol. II.

(*z*) C. S. O. 155; L. S. O. 112. See

vol. II.

(*a*) Ante, p. 361. See and consider *Manchester, Sheffield and Lincolnshire R. Co. v. Wallis*, 14 C. B. 220. See also *Fawcett v. North Midland R. Co.*, 16 Q. B. 610; 20 L. J., Q. B. 222.

It has been held by the Court of Queen's Bench (b) that this section amounts virtually to a prohibition to *the public* to open the gates, or pass across the railway, except at a time when the gates are opened by the person in charge, and that no one else has a right to open the gates, which are an obstruction authorized by act of Parliament. Where, therefore, a declaration alleged that the plaintiff wanted to cross the railway, and there being no person in charge to open the gates, after waiting a reasonable time opened them himself and got injured by the gate swinging to, it was held that no action was maintainable against the company for the injury.

Publics may not open gates.  
*Wyatt v. Great Western R. Co.*

Sect. 48 restricts, to four miles an hour, the speed of trains crossing turnpike-roads on the level near a station, and gives power to the Board of Trade to make rules with regard to level crossings.

Sect. 48.

The Railways Clauses Act, 1863, contains further special provisions (applicable where the special act incorporates Part I. of that act), as to level crossings over turnpike-roads or public carriage-roads when authorized by a special act (c); forbidding the shunting of trains over level crossings, or engines, &c., standing across the same (d); compelling the company to erect lodges at level crossings, or keep watchmen there, under a penalty; and authorizing the Board of Trade to require bridges to be substituted for level crossings, if necessary for the public safety, in which cases lodges and persons to open gates are dispensed with. If a bridge be required by order of the Board of Trade, a mandamus will not be granted to enforce such an order upon a company unable to comply with it from want of funds (e).

Shunting over level crossing forbidden.  
R. O. Act, 1863, ss. 5-8.

Requirement of bridge by Board of Trade.

It has been observed in a Scotch case, that although a company is not bound to erect a foot-bridge at a station to give access from one side of the line to the other, the absence of such a precaution throws a greater onus on the company to provide for the safety of the public (f).

Foot-bridge at station.

Accidents leading to litigation frequently occur at level crossings, as the decisions referred to in the notes abundantly testify. In most of them the plaintiffs succeeded (g); but in some they

Accidents at level crossings.

(b) *Wyatt v. Great Western R. Co.*, 34 L. J., Q. B. 201; 6 B. & S. 709 (diss. Blackburn, J.).

(c) 26 & 27 Vict. c. 92, ss. 5-8.

(d) As to right of way over certain level crossings under a special act, by which a railway company, having carried their line through Crown lands, were bound to make crossings, giving access to them, see *United Land Co. v. Great Eastern R. Co.*, L. R., 17 Eq. 158; affirmed L. R., 10 Ch. 586. The lands, which were partly a marsh when the line was made, were afterwards built upon, and an injunction was granted

to restrain the company from obstructing the crossings.

(e) *Bristol and North Somerset R. Co., In re*, L. R., 8 Q. B. D. 10; 47 L. J., Q. B. D. 48.

(f) *Girchwood v. North British R. Co.*, 4 Sc. Sess. Ca., 4th Series, 115.

(g) *Manchester Junction R. Co. v. Fularton* (carriage-horses frightened by blowing off of steam from mud-cock), 14 C. B., N. S. 54; *Bilbee v. London, Brighton and S. C. R. Co.*, (crossing specially dangerous), 84 L. J., C. P. 182; 18 C. B., N. S. 584; *Lunt v. L. and N. W. R. Co.* (negligence

G. Level CrossingsAccidents at  
level crossings.*N. E. R. Co. v.  
Wantless.*

failed (*h*); in others nonsuits have been held to be wrong (*i*). The facts in these cases are usually long and special, and it will be sufficient to select the more prominent of them for detailed notice. We will commence with *North Eastern R. Co. v. Wantless* (*k*). In that case the railway crossed a public carriage-road on the level. The crossing was provided with gates, opening outwards from the railway, and a gatekeeper, and with swing-gates for foot passengers. A boy, aged fourteen, came to the crossing soon after a cart had passed over the line, and, finding the gates still open, walked on to the line, along which two trains were about to pass in opposite directions. The boy saw and waited for the first train, but did not see and was knocked down by the second. It was held by the House of Lords, affirming the two decisions below, that there was evidence of negligence in the company, inasmuch as the company ought to have closed the gates, and the fact of their being open was an invitation to the boy to cross. Here the negligence would have consisted either in opening the gates for the cart too soon before the passing of the trains, or in not closing them soon enough after the passing of the cart.

It was observed by Lord Cairns that "the whole question was for the jury," and "that the effect of the decision could not be otherwise than wholesome if it made railway companies perform the duty cast upon them by the law of keeping the gates at level crossings closed when trains are in sight." Where, therefore, there is an omission to perform a statutory duty, and such omission causes the injury of any

of gatekeeper), 35 L. J., Q. B. 805; L. R., 1 Q. B. 277; *Stapley v. London, Brighton and S. C. R. Co.* (carriage-gate open), 35 L. J., Ex. 7; L. R., 1 Ex. 21; *James v. Great Western R. Co.* (absence of whistle), 36 L. J., C. P. 255; *Dickinson v. L. and N. W. R. Co.*, 1 Harr. & Ruth. 209; *Williams v. Great Western R. Co.* (child injured, crossing unfenced, connection of negligence with accident), L. R., 9 Ex. 157; 43 L. J., Ex. 106; 31 L. T. 124; *Oliver v. North Eastern R. Co.* (rails too high above road), L. R., 9 Q. B. 469; *North Eastern R. Co. v. Wantless* (carriage-gate open), L. R., 7 H. L. 12; 30 L. T. 275; *Sneesby v. L. and Y. R. Co.* (entirely frightened while crossing sidings), L. R., 1 Q. B. D. 42, affirming decision below, L. R., 9 Q. B. 263; *Brooks v. L. & N. W. R. Co.*, 31 W. R. 167.

(*h*) *Stubley v. L. & N. W. R. Co.* (footway, no duty to place watchman), 35 L. J., Ex. 3; L. R., 1 Ex. 13; 4 H. & C. 83; *Skelton v. Same Co.* (footway, contributory negligence), 36 L. J., C. P. 249; L. R., 2 C. P. 681; *Walker v. Midland R. Co.* (no duty to place watchman), 14 L. T. 798; *Wyatt v. G. W. R. Co.* (plaintiff injured by opening gate himself in

absence of gatekeeper), 6 D. & S. 709; 34 L. J., Q. B. 204; *Cliff v. Midland R. Co.* (occupation road), L. R., 5 Q. B. 254; 12 L. T. 382; *Ellis v. G. W. R. Co.* (dark night, no whistle), L. R., 9 C. P. 551; 13 L. J., C. P. 304; 30 L. T. 874; *Dacey v. L. & S. W. R. Co.* (contributory negligence disclosed by plaintiff's case), L. R., 12 Q. B. D. 70, and p. 366, post; *Wright v. Midland R. Co.* (contributory negligence disclosed by plaintiff's case), 51 L. T. 539; *Wakelin v. L. & S. W. R. Co.* (no connection of negligence, if any, with accident), L. R., 12 App. Cas. 41. It may often be material to consider the special act under which the level crossing was constructed, and whether it incorporates Part III. of the Railways Clauses Act, 1863, or not.

(*i*) See *Brown v. Great Western R. Co.*, 52 L. T. 622.

(*k*) L. R., 7 H. L. 12; 43 L. J., Q. B. 185; 22 W. R. 561; 30 L. T. 275, affirming *Wantless v. N. E. R. Co.*, L. R., 9 Q. B. 481. In the Exchequer Chamber, Bramwell, B., dissented, and several of the judges expressed doubts as to the correctness of the verdict on the question of contributory negligence.

person using the crossing, there can be no doubt as to the liability of the company. But it is not so easy to determine the liability in other cases. In the common case, where carriage-gates are kept closed, and a foot passenger is injured on passing through swing-gates, there is the authority of the Exchequer Chamber for saying that the foot passenger, whether by day or night, crosses the line at his own risk, if the traffic be conducted in the usual manner, and the line be free from curves on either side of the crossing. This must be taken to be the effect of *Ellis v. Great Western R. Co. (l)*. In that case the plaintiff was knocked down in crossing after dark, and heard no whistle from the train. Grove, J., held that there was evidence of negligence, but on a bill of exceptions, the Exchequer Chamber (*m*) set aside this ruling. Bramwell, B., observed :—

Foot passenger  
crosses line by  
swing-gate at  
his own risk.  
*Ellis v. G. W.  
R. Co.*

“I think there is no evidence to go to the jury. The road being straight—things on it visible for a quarter of a mile in one, and half a mile in the other direction,—and there being nothing to impede the view or make a difficulty for the foot passengers crossing the line, nothing was necessary to be done by the defendants. The sight and sound of the approaching trains was enough warning. If not, I cannot see why it should not be held that where a carriage-road crosses a footpath, the driver is bound to blow a horn or stop, or have somebody at the crossing to warn the foot passengers.”

And Mellor, J., said,—

“I cannot see in the bill of exceptions any evidence set forth which was proper and sufficient to submit to the jury. . . . I do not desire to withdraw or qualify anything which I am reported to have said in *Oliff v. Midland R. Co. (n)*. I think that the opinion which I expressed was strictly correct as applicable to the circumstances of that case, in which the engine which caused the injury was not the engine of any regular train, but was employed in shunting trucks after the regular train had passed. . . . In the present case there was nothing unusual in the management of the traffic of the night in question. The trains were the usual and accustomed trains, passing at the usual and accustomed times . . . It is not enough, in order to make out a case to go the jury, that the party injured did not see a light or hear a whistle. He must give evidence that ought to satisfy a jury that there was something negligent or unusual in the conduct of business on that night. It is, I think, apparent from the evidence that the traffic had been conducted for a long time in the same manner as it was on that night; and I think it must be taken that the plaintiff, who stated that he had lived near the spot for thirty years, and crossed at the crossing once or twice a week, was aware that trains coming in opposite directions passed that spot about the same time every night, and I think that the true inference from the evidence on the part of the plaintiff was that the accident was due entirely to his own want of ordinary care.”

(l) L. R., 9 C. P. 551; 43 L. J., C. P. 304; 30 L. T. 874.

(m) Bramwell, Pollock and Amphlett, BB. and Mellor, J., diss. Cockburn, C. J., and Cleasby, B. The majority of the Court appears to have taken into con-

sideration, more or less, certain evidence for the defendants; whereas Cockburn, C. J., said that the case ought to have been considered quite irrespectively of such evidence.

(n) See *infra*.

In *Cliff v. Midland R. Co. (o)*, the plaintiff crossed by an occupation-road. There were gates across the road left unfastened, and the company had at one time kept a gatekeeper, but had ceased to keep one some time before the accident. Powers had been obtained from Parliament to substitute a safer road for the occupation-road, but the company had failed to exercise them. It was held to be a misdirection both to leave to the jury the omission to keep a gatekeeper, and the omission to exercise the powers of the act.

Lush, J., observed,—

“I think that where the Legislature authorizes a railway to cross a way, public or private, upon a level, and does not require from the company any precaution to avoid danger, the Legislature intends that the persons who have to cross that line should take the risk incident to that state of things. But it may be, and I am inclined to think that it is, a sound principle that if the railway company in the construction of the works so authorized, in the exercise of the discretion which the Legislature has vested in them, do anything which prevents persons passing over the line from taking care of themselves and exposes them to greater peril than is ordinarily incident to a level crossing, the company thereby impose upon themselves an obligation to take other than the usual precautions for the protection of persons who have a right to pass there, and, as it were, to make up to the public for that which they have taken away from them. That I take to be the principle of *Bilbee v. London and Brighton R. Co. (p)*. As I read the case it may be well sustained upon that principle. If it cannot, then I do not see any ground upon which it can be sustained.”

Contributory negligence.

As in the case of ordinary actions for negligence the “contributory negligence” of the party damaged may be set up as a defence by the company, and it was held by two judges of the Court of Appeal in *Davey v. L. & S. W. R. Co. (q)*, that if the party be not “reasonably” misled into not looking out before he crosses, and do not look out before he crosses, a case of negligence on the part of the company, such as not whistling, ought to be withdrawn from the jury; and, further, that the mere fact that a gatekeeper, standing on the opposite side of the crossing, did not warn the party, was not a “reasonable” misleading of him.

Connection of negligence with injury.

*Wakelin v. L. & S. W. R. Co.*

It is incumbent upon the plaintiff to show not merely that the negligence of the defendants might have caused the injury sued for, but that it did cause it. On this ground *Wakelin v. L. & S. W. R. Co. (r)*, was decided. There the line crossed a public footpath, the approaches to the crossing being guarded by hand-gates in charge of

(o) L. R., 5 Q. B. 258; 22 L. T. 382.  
(p) 18 C. B., N. S. 584; 34 L. J., C. P. 182.  
(q) L. R., 12 Q. B. D. 70; 53 L. J., Q. B. 58; 49 L. T. 739—C. A.; decided by Brett, M. R., and Bowen, L. J. Bag-

gallay, L. J., diss., affirming L. R., 11 Q. B. D. 213.

(r) *Wakelin v. L. & S. W. R. Co.*, L. R., 12 App. Cas. 41; 56 L. J., Q. B. 229; 55 L. T. 596; 35 W. R. 141, affirming both decisions below.

a watchman by day but not at night. The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried head-lights, but did not whistle. No evidence was given as to how the deceased got on the line. The House of Lords held that even assuming there was negligence on the part of the company, there was no evidence to connect such negligence with the man's death (r).

It would seem doubtful how far a person crossing the line of railway at a spot where there is no authorized level crossing has a right to call upon the company to give warning by whistle or otherwise of the approach of trains where the company have acquiesced in a previous crossing at about the same spot; the omission to give warning may, under some circumstances, be evidence of negligence. This question was much discussed by the House of Lords in *Dublin, Wicklow and Waterford R. Co. v. Slattery* (s), in which case the train which caused the injury was approaching a station at night. The majority of the House (t) was for the plaintiff, notwithstanding that notice forbidding persons to cross had been put up by the company; inasmuch as these notices had been continually disregarded and their observance not enforced, it was held that the company could not set them up in answer to the action.

If the commissioners of a turnpike-road, or the surveyor of highways, apprehend danger to the passengers on such road, in consequence of horses being frightened by the engines on the railway, application may be made to the Board of Trade, who may certify what works are proper for the purpose of obviating the danger (sect. 63); and the company must make any screen or other work in pursuance of the certificate, or pay a penalty; and the justices who impose the penalty may order it to be applied in executing the work in respect whereof the penalty was incurred: (Sect. 64.) So the Board of Trade may dispense with a strict compliance of the statute in regard to the construction of certain public works of an engineering nature: (Sect. 66.)

(r) See p. 366.

(s) L. R., 3 App. Cas. 1155; 39 L. T. 385; 27 W. R. 191, affirming I. R., 8 C. L. 531, and I. R., 10 C. L. 256, Ex. Ch. (the Exchequer Chamber had been equally divided). See also *Harrison v. North Eastern R. Co.*, 29 L. T. 844; 22

W. R. 335; *Darrett v. Midland R. Co.*, 1 F. & F. 361, per Watson, B., at nisi prius; *Wiley v. Midland R. Co.*, 35 L. T. 244.

(t) Lords Cairns, Penzance, O'Hagan, Selborne and Gordon; diss., Lords Hatherley, Coleridge and Blackburn.

Trespasser.

R. C. Act, s. 63.

Screens.



## 7. Accommodation Works.

R. C. Act, s. 68.

## 7. Construction of Accommodation Works.

The company are required by the 68th section of the Railways Clauses Act, 1845, to make and maintain the following works, for the accommodation of the owners and occupiers of lands adjoining the railway :—

Gates, bridges, &amp;c.

"Such and so many convenient gates, bridges, arches, culverts, and passages over, under or by the sides of or leading to or from the railway, as shall be necessary for the purpose of *making good any interruption caused by the railway to the use of the lands through which the railway shall be made*; and such works shall be made forthwith, after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof :

Fences.

"Also sufficient posts, rails, hedges, ditches, mounds or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers (u) thereof from straying thereout by reason of the railway (x), together with all necessary gates, made to open towards such adjoining lands, and not towards the railway, and all necessary stiles; and such posts, rails and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be :

Drains.

"Also all necessary arches, tunnels, culverts, drains or other passages, either over or under, or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway, as before the making of the railway, or as nearly so as may be; and such works shall be made from time to time as the railway works proceed (y).

(u) "Occupier" includes licensee of occupier, *Dawson v. Midland R. Co.*, L. R., 8 Ex. 8; 21 W. R. 56.

(x) The obligation cast upon the company by this section is the same as it would have been at common law, if they had been bound by prescription to repair the fences; in other words, they are only bound to keep up the fences against the cattle of the owners or occupiers of adjoining lands. If therefore cattle stray into a field adjoining the railway, or are there without the owner's consent, and thence get on to the railway and are injured, the company are not liable. *Ricketts v. East and West India Docks and R. Co.*, 12 C. R. 160; 21 L. J., C. P. 201; 16 Jur. 107x. So if cattle have strayed on to a railway, or are occupying the highway in a manner not according to the dedication of the owner of the soil, and get thence through an open gate or defective fence on to the railway and are injured, the company are not liable. *Manchester, Sheffield and Lincolnshire R. Co. v. Wallis*, 14 C. B. 213. But where a colt had strayed on to a highway, and whilst being driven home escaped into a railway yard and thence on to the line and was killed, the company were held liable, as the colt was lawfully using the highway. *Midland R. Co. v. Daykin*, 17 C. B. 126. The obligation imposed by this section does not apply if the adjoining land belongs to the company; if therefore, e.g., cattle are, by permission of the company, grazing, or on

the slopes or embankments of the railway, or in a yard belonging to the company, and stray thence on to the line and get injured, the company would not be liable. *Marfell v. South Wales R. Co.*, 29 L. J., C. P. 315; 8 C. B., N. S. 525. And see *Roberts v. G. W. R. Co.*, 27 L. J., C. P. 266; 4 C. B., N. S. 506; *Hardcastle v. South Yorkshire R. Co.*, 28 L. J., Ex. 139; 4 H. & N. 67; *Hounsell v. Smyth*, 29 L. J., C. P. 203; 7 C. B., N. S. 731; *Binks v. South Yorkshire and River Don Co.*, 32 L. J., Q. B. 26. Where the vegetables of a tenant of a railway company were eaten by the horses of an adjoining owner by reason of defective fencing, it was held that the company had neglected their duty under this section to fence, the tenant could not recover from the adjoining owner for the trespass of his horses. *Wickman v. Booker*, L. R., 3 C. P. D. 184. As to the right of distraining damage feasant-cattle which have strayed through defect of fences which distrainer was bound to repair, see *Singleton v. Williamson*, 7 H. & N. 410. In *Buxton v. North Eastern R. Co.*, L. R., 3 Q. B. 549, it was held that sect. 68 imposes no duty on the company towards their passengers to keep up fences. (Leave to appeal was given, but the plaintiff did not avail himself of it.)

(y) Repairs of drains by the side of the railway, which, in consequence of sinking of soil caused by mining, are required to protect mines from percolation of water, are not "accommodation works," but the

"Also proper watering-places for cattle where, by reason of the railway, the cattle of any person occupying any lands lying near thereto shall be deprived of access to their former watering-places; and such watering-places shall be so made as to be at all times as sufficiently supplied with water as theretofore, and as if the railway had not been made, or as nearly so as may be; and the company shall make all necessary watercourses and drains for the purpose of conveying water to the said watering-places" (2).

Watering-places.

But it is provided by the same section that the company need not make such accommodation works in such a manner as to obstruct the railway, and need not make them at all if the owners and occupiers have agreed to accept compensation instead.

Compensation in lieu of accommodation works.

That the owner should have agreed for and accepted compensation under this proviso does not affect the occupier, so that a tenant from year to year may recover damages for loss by non-fencing, although his landlord has released the company from the obligation to fence (a).

What are such accommodation works must be determined at the time of the construction of the line. They are such works as are required by necessity apparent on the surface, and do not apply to such as may be afterwards necessary by prospective working of mines (b). The making of these accommodation works is a matter totally distinct and unconnected with assessing the value of the lands (c).

The company, for the purpose of constructing accommodation works, may take lands, being within the limits of deviation, by compulsory purchase, and this holds good although there is a possible mode of constructing the works without an exercise of the compulsory powers (d).

Powers to take land compulsorily.

If any difference arise as to the kind or number of the accommodation works, or as to maintaining them, the same may be determined by two justices (e) (Sect. 69); and if the company fail to obey the justices' order, the party aggrieved may execute the works or repairs himself, at the expense of the company; and any dispute about the expenses is to be settled by two justices (f); but the railway must not

Reference to justices concerning accommodation works, R. C. Act, s. 69.

subject of an action. *R. v. Fisher*, 32 L. J., M. C. 12. Sections 68 and 69 do not apply to matters occurring beneath the surface. *Ibid.*

(2) See *R. v. York and North Midland R. Co.*, 14 L. J., Q. B. 277; *North Midland R. Co. v. Milner*, 15 L. J., Q. B. 379.

(a) *Gorry v. Great Western R. Co.*, L. R., 7 Q. B. D. 322; 50 L. J., Q. B. 386; 44 L. T. 701; 29 W. R. 628—O. A., affirming L. R., 6 Q. B. D. 237.

(b) *R. v. Fisher*, 32 L. J., M. C. 12; 3 B. & S. 191.

(c) Per Lord Cottenham, C., *Skerratt v. North Staffordshire R. Co.*, 5 Railw. Cas. 178; and see *South Wales R. Co. v. Richards*, 18 L. J., Q. B. 310; 13 Q. B. 988.

(d) *Wilkinson v. Hull, Barnsley and West Riding Junction Railway and Dock Co.*, L. R., 20 Ch. D. 323; 51 L. J., Ch. 788; 46 L. T. 455; 30 W. R. 617—C. A.

(e) It has been held in Ireland that the justices have not jurisdiction to decide whether or not there shall be accommodation works, but only on their kind, number and sufficiency. *R. v. Waterford and Limerick R. Co.*, 2 Ir. C. L. R. 580.

(f) These expenses are therefore not a legitimate subject of compensation, and if a jury give anything in respect of them, that will be an excess of jurisdiction, vitiating perhaps the whole of the proceedings. *R. v. South Wales R. Co.*, 18 Q. B. 988.

7. Accommodation Works.

Concurrent jurisdiction of High Court.

Fastening gates.

be obstructed for a longer time than is unavoidably necessary for the execution of the accommodation works: (Sect. 70.) If the owners or occupiers of lands consider the accommodation works insufficient for the commodious use of their lands, they may, at their own expense, make such further works as shall be agreed by the company, or, in case of difference, as shall be authorized by two justices: (Sect. 71.) But if the company so desire, all such last-mentioned accommodation works must be constructed under the superintendence of their engineer, subject to certain restrictions: (Sect. 72.) The company cannot be compelled to make further or additional accommodation works after the expiration of five years or other prescribed period: (Sect. 73.) And no action lies for injury arising from insufficiency of accommodation works after such prescribed period (*g*). Where under a special act, passed in 1841, power was given to justices to direct the construction of drainage works, and no application to justices appeared to have been made, Malins, V.-C., declined to exercise a concurrent jurisdiction, and "had a strong impression" that the Court of Chancery had no jurisdiction in the matter (*h*). Until the company make bridges or other proper communications between lands intersected by the railway, the persons whose right of way is affected may pass and repass with carriages, &c., directly (but not otherwise) across the railway; but if compensation has been received for such communication in lieu thereof, then no right of way may be exercised (*i*): (Sect. 74.) If any person omit to fasten any gate set up on either side of the railway for accommodation, he is liable to a penalty: (Sect. 75.)

Where a railway company put up a gate across a public footway which was also an occupation-road, and locked it, and gave a key to

(*g*) *Colley v. L. & N. W. R. Co. and G. W. R. Co.*, L. R., 5 Ex. D. 277; 49 L. J., Ex. 575; 42 L. T. 807; 29 W. R. 16.

(*h*) *Hood v. North Eastern R. Co.*, L. R., 11 Eq. 116; 40 L. J., Ch. 17.

(*i*) As to what amounts to a receipt of compensation for the loss of communication between several portions of an estate, see *Manning v. Eastern Counties R. Co.*, 12 M. & W. 237; 3 Railw. Cas. 637. A railway act enacted, "that it should be lawful for the owners and occupiers of lands through which the railway should be made (except in cases in which the company should, at their own expense, have made communications from the land on the one side of the railway to the land on the other, according to an agreement with the owner, &c., or according to the provisions of the act), at all times for the purpose of occupying the same lands, to pass and repass directly over such parts of

the railway as should be made upon their lands." By another section it was provided, that the company should, at their own expense, so soon as the railway should be laid out and formed, make such communications as justices of the peace should, upon the application of the owners, &c. (in case of any dispute), judge necessary. Another section prohibited riding, &c. upon the railway, "except only at places to be appointed for that purpose, for the necessary occupation of the respective lands through which the railway should pass." It was decided that, until the company had made a communication, a party whose land had been covered by the railway had a right to pass from his property on one side of the railway to the other, at any point; and that the words "to be appointed" must be read with the addition of "when such places shall have been appointed." *Grand Junction R. Co. v. White*, 2 Railw. Cas. 559.

the plaintiff, a landlord whose land was intersected by the railway; and the key being lost through the negligence of the plaintiff or his servants, his cattle escaped on to the line and were injured, the company were held not liable (*k*).

The company, for the purpose of making the railway, may alter the position of water-pipes, gas-pipes and other obstructions, under the restrictions and penalties prescribed by the act (Sects. 18, 19, 20, 22, 23), making good all damage and paying compensation: (Sect. 21). The penalty for obstructing the supply of water or gas is 20*l.* a day, to be appropriated to the benefit of the poor of the parish (*l*): (Sect. 23.)

Interference  
with water-  
pipes, gas-  
pipes, &c.

### 8. *Company not bound to construct Railway.*

8. Construction  
not obligatory.

Generally speaking, a railway company cannot be compelled by law to construct their line, inasmuch as, in the great majority of special acts, the powers conferred upon the companies are merely permissive.

It was at one time supposed in England, as it seems to have been thought in Scotland, that permissive powers given by an act of Parliament to a railway company were obligatory upon them. The case of *Phillip v. Edinburgh, Perth and Dundee R. Co.* (*m*) in Scotland, and that of *R. v. York and North Midland R. Co.* (*n*) in 1852 in England so decided. This latter case, however, was reversed in 1853, in the Exchequer Chamber, and the former in the House of Lords in 1857 (*o*). It was decided in *York and North Midland R. Co. v. R.* (*p*), in the Exchequer Chamber, that if a statute merely directs "that it shall be lawful" (*q*) for the company to make the railway, then no duty is cast upon them to make the railway, or even to complete it after they have formed one portion of it.

Mandamus to  
construct rail-  
way.

Does not lie if  
Act permissive  
only.

This rule does not apply if the language used by the Legislature is imperative; for if it be, a mandamus would undoubtedly lie (*r*); but

(*k*) *Ellis v. London and South Western R. Co.*, 23 L. J., Ex. 349.

(*l*) Under the Metropolitan Inner Circle Completion Act, 1874, § 37 & 38 Vict. c. cxcix. s. 54, 10*l.* an hour, for the benefit of the water or gas company.

(*m*) 2 Macq. 514.

(*n*) 1 E. & B. 178.

(*o*) 2 Macq. 519; 1 E. & B. 858. And see *Scottish North Eastern R. Co. v. Stewart*, 3 Macq. 882, where Lord Wensleydale said, "But though the company were not bound to exercise the powers because the Legislature have given them, it was competent for them to bind them-

selves to do so, and that I think they have done by this agreement."

(*p*) 1 E. & B. 858; 7 Railw. Cas. 459; 22 L. J., Q. B. 225, cor. Jervis, C. J., Pollock, C. B., Cresswell and Williams, JJ., and Parke, Platt and Martin, BB. For the facts and judgment, see former editions of this work.

(*q*) These were the words usually inserted in special acts of that date. Modern draftsmen seem generally to employ the still weaker phrase, that the company "may make and maintain" the railway.

(*r*) See *Great Western R. Co. v. R.*, 1 E. & B. 874.

8. Construction  
not obligatory.

modern special acts rarely, if ever, contain words directly compelling the company to make the railway, though indirect compulsion is partially resorted to by clauses providing for the enforcement of penalties, or for the impounding of deposit money in the case of the lines not being completed within the time limited for their completion.

It is now proposed to state in detail some selected cases in further illustration of the subject of the present chapter. These cases are arranged as follows :—

Cases relating to construction of the railway and deviations from the parliamentary plans :

Cases relating to the construction of bridges :

Cases relating to the diversion of roads :

Cases relating to the repair of works :

Cases relating to the liability of the company and their contractors, for negligence in the construction of the works (s).

(s) The following table shows the order and subjects of the cases :—

PAGE Sect. 7.—THE LINE OF RAILWAY.

- 373. *Cranford v. Chester and Holyhead R. Co.*, 11 Jur. 917.—Construction of station.
- 374. *Otther v. Midland R. Co.*, 5 Railw. Cas. 187.—Construction of station.
- 375. *Eton College v. G. W. R. Co.*, 1 Railw. Cas. 200.—Meaning of "station."
- 375. *Gordon v. Cheltenham, &c. R. Co.*, 2 Railw. Cas. 800.—Meaning of "station."
- 376. *Dover Harbour v. S. E. R. Co.*, 21 L. J., Ch. 886.—Meaning of "railway building."
- 377. *Attorney-General v. Eastern Counties R. Co.*, 10 M. & W. 263.—Arch over street for station.
- 378. *Abraham v. G. N. R. Co.*, 16 Q. B. 586.—Obstruction of navigable river.
- 380. *Lancaster and Carlisle R. Co. v. Maryport and Carlisle R. Co.*, 4 Railw. Cas. 504.—Inconsistent powers of two companies.
- 381. *Webb v. Manchester and Leeds R. Co.*, 4 M. & Cr. 116.—Reference to engineer.
- 381. *Brecon Markets Co. v. Neath and Brecon R. Co.*, L. R., 8 C. P. 157.—Drift toll.

Sect. 8.—BRIDGES.

- 382. *London and Birmingham R. Co. v. Grand Junction Canal Co.*, 1 Railw. Cas. 224.—Temporary bridge.
- 383. *Priestly v. Manchester and Leeds R. Co.*, 2 Railw. Cas. 134.—Temporary bridge.
- 383. *R. v. Rigby*, 14 Q. B. 687.—Width of bridge over road.
- 385. *R. v. Birmingham and Gloucester R. Co.*, 2 Q. B. 47.—Width of approaches to bridge.
- 385. *Attorney-General v. London and Southampton R. Co.*, 1 Railw. Cas. 283.—Ascent to bridge.
- 386. *R. v. Eastern Counties R. Co.*, 2 Q. B. 569.—Local Paving Act.
- 387. *R. v. Shurpe*, 3 Railw. Cas. 83.—Skew bridge.
- 387. *Wood v. North Stafford R. Co.*, 1 Mac. & G. 278.—Strengthening bridge.
- 389. *Attorney-General v. Eastern Counties R. Co.*, 3 Railw. Cas. 337.—Temporary bridge.

9. Cases relating to the Construction of the Railways and  
Deviations from the Parliamentary plans.

9. Cases as to the  
Line of Railway.

*Crawford v. Chester and Holyhead R. Co.* (t).]—Upon a motion to dissolve an injunction which had been issued to prevent defendants from taking plaintiff's lands for the purposes of a railway, it appeared that, on the plans and in the books of reference deposited by the company, plaintiff's land was marked No. 1 and No. 4, and the line of deviation passed through both lots, leaving part of each outside the line or limit of deviation; and the company served plaintiff with notice, that they required the whole of lots 1 and 4, for the purposes of their acts. Plaintiff, conceiving that the company had no powers to take any land beyond the limits of deviation, declined giving the company possession of those parts beyond the line of deviation. The company thereupon proceeded to take possession thereof, under the compulsory powers of the act, and commenced making a station thereon. Plaintiff thereupon obtained an injunction, to restrain the company from taking or entering upon such parts of his lands as were not within the limits of deviation in the plan deposited. *Shadwell, V.-C.*, upon motion, dissolved the injunction. His Honor said:—The real question is, whether, attending to the language of the special act, and the paper representing the position of the line deposited with the clerk of the peace, the company have a right to take the whole of the lands without regard to the line of limits of deviation. The act takes notice of a former act, and that it is for the local advantage of the neighbourhood of Chester, that the company should be authorized to extend the line, and construct a new station there. Then the 4th section enacts, that whereas plans and sections for the extension of the said railway, and of the proposed new station, &c., have been deposited with the clerk of the peace, the company shall be at liberty to take lands, &c. Now, I must take it for granted that the Legislature considered this special question, whether it might not happen that the line should be altered, so that the whole land specified in the plan might be required to build their station, on the lands marked out on the plans deposited. It appears to me that the Legis-

When lands beyond the limits of deviation may be taken for the purposes of a station.

*Crawford v. Chester and Holyhead R. Co.*

Sect. 9.—ROADS.

- 389. *Attorney-General v. L. & S. W. R. Co.*, 3 De G. & S. 439.—Substituted road.
- 391. *Attorney-General v. Ely, &c. R. Co.*, L. R., 4 Ch. 194.—Diversion of road to level crossing.
- 392. *Attorney-General v. G. N. R. Co.*, 4 De G. & S. 75.—Obstruction of road.
- 394. *Aldred v. North Midland R. Co.*, 1 Railw. Cas. 404.—Assent of turnpike trustees to bill.
- 395. *Breynton v. L. & N. W. R. Co.*, 11 Jur. 28.—Bridge instead of level crossing.
- 396. *London and Brighton R. Co. v. Blake*, 2 Railw. Cas. 322.—Obstruction of substituted road by surveyor of highways.
- 397. *London and Brighton R. Co. v. Cooper*, 2 Railw. Cas. 312.—Road to a wharf.

Sect. 10.—REPAIR OF WORKS.

- 398. *R. v. Kent*, 13 East, 220.—Repair of bridge.
- 398. *Oliver v. N. & E. R. Co.*, L. R., 9 Q. B. 409.—Level crossing.
- 398. *G. W. R. Co. v. Bishop*, L. R., 7 Q. B. 550.—Leaky bridge.

Sect. 11.—NEGLECT IN CONSTRUCTION OF WORKS.

- 398. *Reedie v. L. & N. W. R. Co.*, 4 Exch. 244.—Company not liable.
- 401. *Knight v. Fox*, 5 Exch. 721.—Sub-contractor liable.
- 402. *Kearney v. L. B. & S. C. R. Co.*, L. R., 6 Q. B. 759.—Fall of brick from bridge.
- 408. *Daniel v. Metropolitan R. Co.*, L. R., 5 H. L. 45.—Independent contractors.
- 404. *Grote v. Chester and Holyhead R. Co.*, 2 Exch. 251.—Fall of bridge.

9. *Cases as to the Line of Railway.*

lature thought that right, and they say in this sentence—"It shall be lawful for the company, subject to the powers of deviation in the said Railways Olausen Consolidation Act, to make and amend the said extension, and the said station, and the works connected therewith, in the lines and upon the lands delineated upon the said plans, and described in the said books of reference, and to enter upon, and take and use such of the said lands as shall be necessary for the purpose." This is most singular language, because it speaks originally of the things separately, and by distinct language; but here a notion of combination seemed to have prevailed in the minds of those who framed the act. I think you must use your common sense, and see whether the difficulties have not arisen merely from the Legislature using consolidating language. Why, if they had said it shall be lawful for them to make and maintain the same station, then there would not have been any doubt. I cannot but think, that inasmuch as the plans show where the station should be placed, it was the intention of the Legislature to empower the company to make it on the whole of the land, without attention to the limits of deviation at all. Injunction dissolved.

When lands may be taken to construct a station beyond the lines of deviation.

*Cotter v. Midland R. Co.*

*Cotter v. Midland R. Co. (11).*—Motion to dissolve an injunction granted by *Wigram, V.-C.*, to restrain defendants from proceeding to assess the amount of compensation to be paid for a piece of land, which was used by the plaintiff as a rope-walk, on which there were several cottages. By the act the company were empowered to make a certain line of railway, including an extension of the main line to the High Orchard Basin at Gloucester; and it was for the purpose of that extension, and the works connected with it, that the land in question was required. The maps and plans deposited showed that two small portions only of the land, at the northern and southern extremities, were wanted for the extension line itself; but the whole was numbered, and the company insisted that the rest was necessary for other purposes, and, amongst others, for the erection of a new station, or an addition to the old one, at the terminus of the original line; and also for sidings on which the waggons employed in the conveyance of goods from the terminus to the basin might wait until there was a sufficient number of them to form a train.

*Lord Cottenham, C.*—The question between these parties is very simple. The piece of land sought to be taken from the plaintiff by the company is described in the map, plan and book of reference deposited with the clerk of the peace; and the act of the company, after describing the line of railway, authorizes the company to make and maintain the railway and works thereby authorized, in the line, and in the manner after provided; and, after reciting the deposit of the plan, section, and books of reference, authorizes the company to make and maintain the railway and works, in the line and upon the lands delineated upon the said plans, and described in the said book of reference, and to enter upon, take and use such of the said lands as shall be necessary for such purpose.

Construction of station.

The plaintiffs do not dispute the right of the defendants to take so much of this piece of land as may be required for forming the line of railway, but deny their right to take any part which exceeds what is wanted for that purpose, although required by the company for the purposes of the railway, in forming or enlarging a station, and in forming places for carriages to collect and wait till the trains are ready to start, no part of which, they contend, is authorized by the act: and that is the whole question; which must be decided by the words of the

act, with the interpretation of such words either in the interpretation clause or by the provisions of the act, or of the Railways Clauses Consolidation Act.

The authority is, to take and use so much of the land in question as shall be necessary for the purpose of making and maintaining the said railway and works.

The Railway Clauses Consolidation Act, in the 3rd section, declares that the expression "railway" shall mean the railway and works by the special act authorized to be constructed. [His lordship read the 16th and 45th sections of the same act.]

There are no more distinct provisions in the special act, or in the Railways Clauses Consolidation Act, authorizing the formation of stations or other buildings and conveniences, which are essential to the working of all railways; and if these provisions do not include such a power, Parliament has authorized the extension of the railway in a manner likely to produce a great increase of traffic, without any power to make those arrangements, which such additional traffic will render indispensable. It seems to me, however, sufficiently clear that these provisions do include ample power for these purposes. The term "railway" by itself includes all works authorized to be constructed; and, for the purpose of constructing the railway, the company are authorized to construct such stations and other works as they may think proper; and assuming that the lands authorized to be compulsorily taken would be taken and used for all ordinary stations and works, the act provides that, for extraordinary purposes, such as additional stations and conveniences, this railway may purchase certain additional quantities of land. I consider that all land, authorized to be taken, as necessary, in the terms of the act, for the purpose of making and maintaining the railway and works, is liable to be so taken, whether necessary for the actual line of the railway, or for stations or other conveniences necessary for the working of the railway; and the purposes for which the plaintiff's land is proposed to be applied clearly fall within that description.

Such, indeed, appears to have been the construction assumed and adopted in several cases. It, in *Eton College v. Great Western R.*, and *Lord Petre v. Eastern Counties R.* (x), the company could not have formed stations without special authority, what was the necessity of introducing special prohibitions, and why were the judgments of the Courts confined to such special prohibitions, when according to the plaintiff's argument, the companies would, for want of special authority, have been incompetent to contract such stations? The motion for the injunction must be refused with costs.

*Gordon v. Cheltenham and Great Western Union R. Co.* (y).—A railway act enacted that it should not "be lawful for the company to make or establish any public station, yards, wharfs, waiting, loading or unloading places, warehouses or other buildings and conveniences for the depositing, receiving, loading or keeping any passengers or cattle, or any goods, articles, matters or things upon the estate of G., or within fifty yards of the boundaries thereof." G. filed a bill to restrain the company from using an engine-house and other buildings erected by them within the prescribed limits:—Held, by the *Master of the Rolls*, that the word "public" did not necessarily override the whole sentence; and that, if it did everything connected with the railway must be considered as for the public use; and the injunction was granted, but with liberty to apply for a rehearing, or to prosecute an appeal to the House of Lords.

Meaning of the words "public station or other buildings."

*Gordon v. Cheltenham and G. W. Union R. Co.*

(x) *Infra*.

(y) 5 Beav. 229; 2 Railw. Cas. 800.



*9. Cases as to the Line of Railway.*

Where land was sold to a railway company upon condition that "the whole of the land should be appropriated to and used solely for the purposes of the railway and the buildings connected therewith."—Held that it was no breach of the condition to erect a building used chiefly by the passengers on the railway, with a room appropriated as a custom-house, to which persons not travelling by the railway occasionally resorted.

*Warden of Dover Harbour v. South Eastern R. Co.*

*Warden, &c. of Dover Harbour v. South Eastern R. Co. (2).]*—Injunction to restrain defendants from using a building as a custom-house, and for the accommodation of their passengers. It appeared that defendants' act contained a clause "that no erection or building should be made without the consent of the plaintiffs, or their surveyor, on certain land conveyed by them to the company, exceeding the respective heights therein specified ; " and by sect. 15, " that the whole of the land to be sold by plaintiffs to the company should be appropriated to and used solely for the purposes of the railway and the buildings connected therewith, except such part as might be required by the Board of Ordnance, or might be necessary to be left open for the increased width of the streets to form the necessary approaches to the railway station ; provided always, that the said ground should not be used or employed for building or erecting thereon any coke ovens, or for any other purposes (the necessary railway purposes only excepted), by which any nuisance might be created or the other property of the plaintiffs in any way damaged. Plaintiffs' bill stated that the company erected the present building, and that one part of it was used as a custom-house for examining the luggage of passengers, collecting duties, granting certificates to aliens, &c. ; that the upper floors of the building were laid out and intended to be used as bed-rooms in connection with an hotel erected by the company, on ground held by them on lease, and which, if so used, would be to the injury of plaintiffs' property, consisting of several hotels in Dover, and to prevent which injury the stipulation in the above act had been inserted.

Sir G. Trevor, V.-C.—This question wholly depends on the 15th section of the act. Now what are the purposes and object of that section ? I think the primary object is the laying out of the land purchased by the company, and I think so for this reason : the words of the clause are not that the whole of the land or ground to be sold to the company, and the buildings thereon, shall be appropriated to and used solely for the purposes of the railway, but that the land or ground to be sold shall be appropriated solely to and for the purposes of the railway and the buildings connected therewith. It is, therefore, the use of the land and ground at which the clause properly looks ; and, on the second branch of the clause, I think the same view arises. It is "except such part or portion thereof as may be required by the Board of Ordnance, &c." still looking, not to the use of the buildings to be erected on the land, but to the mode in which the land is to be laid out or applied. The proviso seems to bear the same construction. Looking at this clause, with that view, I think that this question really depends upon the narrow words which are contained in the clause, "and the buildings connected therewith : " and the first question is, what is the principle to be applied to the construction of this clause ? This is a purchase, in effect a deed of conveyance under a parliamentary power, to sell to a party as owner in fee : and, therefore, every sound construction requires that the restriction which is imposed upon the owner in fee shall not be enlarged or extended beyond its necessary limits. What is the meaning, then, of the words "buildings connected therewith ? " I quite agree with the construction that "connected therewith" means connected with the railway ; and there are three meanings which may be attached to those words. They may mean locally connected with the railway ; or connected with the railway in the sense in which other buildings are connected with other railways, or connected with the railway as buildings applicable to that particular railway. I concur with the plaintiffs' argument upon that point, that they do not mean locally connected with the railway. Do they mean buildings

connected with this railway, in the same sense as other buildings connected with other railways? I do not think that that limited construction can be put on them. I think this must be read "for the purposes of the said railway and the buildings connected with such particular railway." It follows to be considered what is, within the language of this clause, properly a building connected with the particular railway. I really do not know what construction can be put upon, or what meaning can be attached to, the words "buildings connected with the railway," unless it be buildings which are used in some portion, or in some sense, for the purposes of the railway. How, then, does the case stand with reference to these buildings being or not being used for the purposes of the railway? Why the fact, so far as it relates to the custom-house, is, that one of the rooms is exclusively appropriated for the use of the custom-house. But by the side of that room there is another room, in which the passengers wait, whilst their luggage is being examined by the custom-house officers; and on the other side there is another room, into which the luggage, after it has been examined, is passed from the centre room, and then the luggage is separated by the town porters, and it is handed over a rail to porters who carry it, either to the railway or to any other place. Now is that building, so used, connected with the railway? It is a building which, to some extent at least, is used for the purposes of the railway. Can I then say that a building which is, to a certain extent, used for the purposes of the railway, is not to be considered as a building connected with the railway, because other purposes are added to the use of it, and because in that building are examined, not merely the luggage of passengers who pass along the railway, but the luggage of other persons who may not leave Dover, or who may go to hotels in the town? I do not think it is a fair and reasonable construction to hold, that because a building is used, and principally used, for the purpose of examining the luggage of passengers coming from abroad, and passing along the railway, it therefore follows that it is not a building used for the purposes connected with the railway. I think, that being the primary purpose, I should not be justified in holding this use of the building to be such as the act of Parliament does not authorize. As to the bed-rooms, I think the same argument that applies to the one applies also to the other. I am not prepared to say that there may not, hereafter, be such a use of these bed-rooms as would induce this Court to interfere; but as the case at present stands there is no evidence before me, that there is any intention to use them for any such purposes as would warrant me in holding that the building is not, *bonâ fide*, intended to be used and considered as a building connected with the railway. Injunction refused.

*Attorney-General v. Eastern Counties R. Co. (a).*—By a local act, paying commissioners were empowered to remove obstructions from houses and buildings abutting near any streets which, in their judgments, should obstruct the circulation of light or air, or be inconvenient to passengers. An act, establishing the N. & E. R. Co., empowered them to construct arches over the railway or other works, streets, &c., and upon the railway, or any lands adjoining or near thereto, to erect stations. By another act the company were empowered to provide a station and depot near the London terminus of the railway; and all the "clauses, powers, provisions, directions, regulations," &c., contained in the former act should apply to the purchase of land and buildings for the railway, and also for the station, and nothing in that act should extend to prejudice,

Construction of powers given to arch over streets for the purpose of building a station.

*Attorney-General v. Eastern Counties R. Co.*

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derogate from, &c., the privileges of any parish over which the said railroad shall pass, under local acts of Parliament."

The railway company having arched over a street for the purpose of building a station, the *Lord Chancellor* directed a case to be sent to the Court of Exchequer. The following certificate was sent to the Court of Chancery :—"We are of opinion, that the N. and E. R. Co. were entitled, if it was necessary or reasonably convenient for the construction of a station and proper warehouses, to construct and make coverings or buildings, by arches or otherwise, over the public street mentioned in the case, in like manner as they were entitled to do for the construction of the railway itself; and that, by their last act of Parliament, they were expressly authorized to construct such station and warehouses at or near High Street, Shoreditch."

A railway may be constructed along a navigable river according to deposited plans: and upon an action for the obstruction, brought by persons accustomed to navigate the river, it is not incumbent on the company to show, that they have purchased the portion of the bed of the river, used for the railway, from the owner.

*Abraham v. Great Northern R. Co.*

*Abraham v. Great Northern R. Co. (b).]*—Action on the case by owners of vessels navigating the Ouse. The declaration charged defendants with filling up and obstructing part of the bed of that river, penning back water, and preventing it flowing in its accustomed channel, and preventing plaintiffs from navigating that part of the river. Defendants pleaded that they had done the things complained of under the special and consolidated acts for making their railway; that plans and books of reference were deposited with the clerk of the peace; that the part of the bed of the river which was obstructed was among the lands delineated in the plans, and described in the books of reference, and that the works done were necessary for the purpose of making the railway. Upon the trial, before *Patteson, J.*, it was contended, that under this plea defendants were bound, not only to show that the part of the river obstructed was in the plans and books of reference, and was used for the necessary construction of the railway; but also that all notices required by the acts for the purchase of such part of the river, from the owners of the bed of it, had been given, and all other things done, which were requisite to vest that part of the bed of the river in the company. The judge told the jury that the allegations in the plea did not make such proof necessary, and they found a verdict for defendants. A rule for a new trial was afterwards obtained; also for judgment non obstante veredicto, on the ground that if the judge was right in his construction of the plea, the plea was bad for the want of averments, that those various acts had been done, which, it has been insisted, ought to have been proved; and further upon the ground, that none of the acts of Parliament authorized the company to construct their railway upon the bed of the navigable part of the river.

*Patteson, J.*—We are of opinion that the learned judge was right in the construction which he put upon the plea: and therefore that there is no ground for granting a new trial. With respect to judgment non obstante veredicto, we are of opinion that, as against the plaintiffs, who have no interest in the soil of the bed of the river, but have only the right of passage on the navigable highway, common to all the Queen's subjects, it was not necessary for the defendants to aver and prove, that they had taken the proper steps to vest in them the ownership of the bed of the river. If they were entitled by the acts of Parliament to convert a portion of the navigable river into a railway, and so to obstruct and do away with a portion of the navigable channel, it cannot be material to the public at large, or to those persons who were in the habit of navigating that portion, whether the ownership of the bed of the river in that portion has been

effectually transferred, or whether any one entitled to compensation in respect of such ownership has or has not been satisfied.

The remaining question is, whether the defendants were authorized by any act of Parliament to construct their railway upon the bed of the navigable part of the river. The act on which the defendants relied is 8 & 9 Vict. c. 20, s. 16 [this section was read, see ante, p. 352]. The company have here constructed an embankment and road in and upon the river, described in the plan and mentioned in the books of reference. The word "rivers" is here used without any qualification, and would seem therefore to include navigable rivers, as well as rivers not navigable, especially as the word "roads," here also used, plainly includes highways, along which the public have fully as extensive a right of passage as they have along navigable rivers. Other provisions are introduced into the act, as to the mode of using roads, but none as to the mode of using navigable rivers. Whether such provisions were intentionally omitted, and, if so, for what reason we cannot tell; but we cannot see that such omission justifies us in qualifying the meaning of the word "river" in this clause, or in effect adding the words "not navigable," which are not to be found in the clause itself. The plans and books of reference would be before the Legislature, when the special act for constructing this railway was passed; and although it may be true, as was suggested, that no particular individual felt so much interest in opposing the act, by reason of the insertion of a portion of this navigable river in such plans and books, as to make it a subject of controversy during the progress of the act, yet we are not warranted in supposing that the Legislature overlooked such insertion, or in limiting the operation of the plain words which the Legislature has employed. The subsequent part of the clause in question was relied on by the plaintiffs, which provides that the company may "alter the course of any rivers not navigable within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper;" and it was urged that the Legislature manifestly intended to confine the power of diverting and altering the course of rivers to those which are not navigable, which would be entirely frustrated if the word "rivers," in the prior part of the clause, were held to include navigable rivers, since the language used in that prior part is so comprehensive as to include the power of diverting and altering the course of the rivers there mentioned. But we think that this reasoning is not sound. The prior part of the clause gives only the power of constructing works in and upon rivers, within the lands described in the plans and books of reference; yet we think not so as to divert or alter the entire course of such rivers, or to obstruct the whole navigation of them if navigable; for we cannot suppose that the Legislature would permit such lands to be included in the plans and books of reference, as would enable the company so to divert or alter the entire course of navigable rivers, or to obstruct the entire navigation of them. But the latter part of the clause, which does apply to such entire diversion and alteration of the course of rivers, is expressly confined to those which are not navigable. The one contemplates the appropriation of a part of the river to the uses of the railway, leaving the residue of it in its usual course, and the navigation of that residue unimpeded where it is a navigable river. The other contemplates the entire destruction of the old course. The erecting anything in a navigable river, or upon a highway, which would be a nuisance if not authorized by act of Parliament, cannot by any reasonable construction of

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language, be considered as a diverting or altering the course of such river or highway. No doubt such an erection in a navigable river, by preventing the water from flowing at all, along the site of the erection, would prevent the water of the river from flowing in its accustomed channel and course in so ample a manner as it otherwise would have done, which is the language used in this declaration; but that is a very different thing from diverting or altering the course of the river, within the meaning of the statute 8 & 9 Vict. c. 20. For these reasons we are of opinion that the plea is sufficient. Rule discharged.

Construction of  
a statute which  
gave inconsistent  
powers to  
two railway  
companies.

*Lancaster and  
Carlisle R. Co. v.  
Maryport and  
Carlisle R. Co.*

*Lancaster and Carlisle R. Co. v. Maryport and Carlisle R. Co. (c).*—Defendants obtained an act for making certain branch railways, and it was provided that nothing therein contained should extend to prejudice, diminish, alter or take away any of the rights, privileges, powers or authorities vested in plaintiffs under their act, but all rights, privileges and franchises of the company, and all the powers, authorities and provisions in the said last-mentioned act contained, were saved and reserved to them as if defendants' act had not been passed; so always, nevertheless, that such rights, &c. be not exercised in such a manner as to prevent defendants from compulsorily taking land of sufficient breadth to admit of the formation of the extensions thereinbefore authorized, such extensions, however, not to exceed respectively twenty-two feet in breadth, with sufficient breadth for the necessary slopes.

Plaintiffs were empowered by their act to take certain lands compulsorily, and also to take certain other lands with consent. Defendants had power to take compulsorily certain lands scheduled in their act, amongst which were certain pieces of land which plaintiffs had purchased,\* with consent of the owners, subsequently to the date of defendants' act.

Defendants gave notice of their intention to take compulsorily a greater quantity of the land purchased by plaintiffs than was required for the line of their railway for stations, &c., whereupon plaintiffs applied for an injunction to restrain defendants from taking more of their land than was necessary for their line of railway.

*Shadwell*, V.-C., granted the injunction, on the ground that plaintiffs, having occupied the ground before defendants, were entitled to hold so much of it as was not actually wanted for the formation of defendants' railway; and said, "The rule applied to the construction of wills is, that the last part controls the first, and so I must treat it with respect to this act of Parliament. In the first instance, the first section gave very general powers, for it declared that, for the purposes of the company, they should have all the powers given by their former act, 'save and except such of them as are by this act repealed, altered or otherwise provided for;' so that in the very first section in which they give the general power, they put a very general restriction by the words that I have last used. The next section applies to the extension, and nothing turns on the construction of that section, because the consent was actually given with respect to the plaintiffs taking the lands."

The 6th section says, "that the company, in making the said extensions and branch railways, shall not have power to deviate to the westward from the line delineated on the plan, or to go through any land which either of these companies have contracted to purchase, or have power under their respective acts of Parliament to purchase." Now there is nothing said about a compulsory power, the

words are only "power to purchase;" and if the defendants, exercising as they thought fit sufficient astuteness, have not taken care to contract to purchase, or to purchase these lands, but have left them open to be contracted for, or to be purchased by the plaintiffs, they have, if I may use an expression peculiar to a certain game, left a blot which the other side took care, when they had the throw, to pick up, and the consequence was that these words of exception have given, unexpectedly I dare say to the defendants, an advantage to the plaintiff which the defendants did not foresee.

*Webb v. Manchester and Leeds R. Co. (d).*—The Manchester and Leeds R. Act (sect. 94) empowers the company to enter into and upon lands according to the provisions and restrictions of the act, and, in or upon such lands, or in or upon lands adjoining thereto, to bore, dig, cut, embank, and remove and use, any earth, stone, gravel or sand, or any materials or things which may be dug or obtained therein, or otherwise in the execution of the powers of the act, and which may be proper or necessary for making, maintaining, repairing or using the railway and other works by the act authorized, or which may obstruct the making, maintaining or using the same; and it empowers the company, according to the provisions and restrictions of the act, to make inclined planes, tunnels, embankments, bridges, &c. Sect. 96 enacts, that the lands to be taken for the line of the railway shall not exceed twenty-two yards in breadth, except where a greater width may be required for either embankments or cuttings.

Construction of railway act as to powers to take lands required to make the railway.

Reference to engineers.

*Webb v. Manchester and Leeds R. Co.*

*Semble*, that the company have not under these clauses power, by compulsory process, to purchase land for the purpose of making an embankment upon other and lower land on a different part of the line.

A point involving questions of practical science being in dispute, and the affidavits being conflicting, the evidence was, at the suggestion of the Court, and with the consent of both parties, referred to an engineer for his report on the question in dispute, and the conclusion of the engineer with respect to the facts was adopted by, and made the ground of the order of, the Court (e).

A railway company will not be prevented by injunction from taking lands for purposes warranted by their act, on the ground that, previously to the commencement of the action, and before the necessity of taking it for such purposes was made known to the plaintiff, the company had endeavoured to take the same lands for other purposes not so warranted.

Ambiguous words in acts of Parliament, authorizing a public company to take land by a compulsory process, are to be construed against the company and in favour of private property.

*Brecon Markets Company v. Neath and Brecon R. Co. (f).*—"The Brecon Markets Act, 1802," vested in the plaintiffs certain tolls which, under the name of "drift tolls," had been immemorially received by the corporation of Brecon for cattle, goods and carriages passing to, through or from the borough. A railway company, under a special act passed also in 1863, acquired land not being a highway, on which they constructed a railway and station within the borough of

Railway company not liable for "drift tolls."

*Brecon Markets Co. v. Neath and Brecon R. Co.*

(d) 4 M. & Cr. 116; 1 Railw. Cas. 576. See *Manser v. Northern and Eastern Counties R. Co.*, 2 R. C. 380.

(e) By "The Judicature Act, 1873," s. 56, the High Court and the Court of

Appeal may call in the aid of assessors specially qualified.

(f) L. R., 8 Q. C. P. 157; 42 L. J., C. P. 63; affirming decision below, L. R., 7 C. P. 555.

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Brecon, whence passengers, goods and cattle were conveyed by other lines of railway to other places beyond the limits of the borough. The rights of the corporation, the plaintiffs, were expressly reserved by the Railway Act, but there was no provision either in that or in the Markets Act expressly enabling the plaintiffs to levy tolls on the railway.

It was held by the Exchequer Chamber that the plaintiffs were not entitled to toll in respect of cattle, goods or carriages passing along the railway. The Court was unanimous, *Blackburn, J.*, observing, that though it was quite true that in the case of a toll or any other prescriptive right which had in fact existed a long time, if any reasonable mode could be suggested by which it might have had a legal origin, it must be presumed that it had such origin; and though it was also quite true that in the case of a harbour toll the right to the toll might extend throughout a manor, or, in the case of a market toll, throughout a town, still he did not think that there was any case "which shows that, where there is a right to a toll traverse within any district, there can be a legal origin for a claim to take such toll in respect of a way used by a person over his own private land." There being no evidence that the corporation ever were accustomed to any such toll as was now claimed, it was not necessary to decide the question.

10. *Cases as to  
Bridges.*

10. *Cases relating to the Construction of Bridges.*

Construction of  
a special act as  
to the right to  
erect a tempo-  
rary bridge  
across a canal.  
*London and  
Birmingham  
R. Co. v. Grand  
Junction Canal  
Co.*

*London and Birmingham R. Co. v. Grand Junction Canal Co. (g).*—A company were empowered by an act to do all works necessary and convenient for constructing a railway, and, among others, to cross canals and make embankments in the line; and, in particular to cross a canal of which defendants were proprietors, and to make an embankment over a valley near the same place. Subsequent clauses in the act restricted the company from doing anything which should obstruct the navigation of the canal; and specified the height and dimensions of any bridge to be made and maintained for carrying the railway over the canal. The company, for the purpose of transporting earth from the higher lands on the south to the lower lands on the north side of the canal, for constructing an embankment, erected a temporary bridge over the canal, supported partly on piles driven into the bed of the canal. Defendants pulled down such bridge, and thereby destroyed the passage of communication for the carriage of the earth. It was decided by Sir *G. C. Pepys, M. R.*, on a motion for an injunction to restrain defendants from destroying such bridge, that the clause empowering the railway company to cross canals in the progress of their works was not restricted by the subsequent clauses, which applied to permanent bridges; and his Honor restrained defendants from obstructing the making or use of such passage of communication.

*Semble.*—Although a railway company are not to act capriciously in regard to carrying out the powers of an act of Parliament, the act constitutes them the judges of the most convenient mode of conducting their works.

(g) 1 Railw. Cas. 224. See also *Attorney-General v. Eastern Counties R. Co.*, post, p. 389.

*Priestly v. Manchester and Leeds R. Co. (h).*—The Manchester and Leeds R. Act, sect. 34, reciting that the railway was to be carried across the Aire and Calder Navigation at three specified places, required the company to erect bridges, and prescribed the dimensions of such bridges. Sect. 38 provided that the company should, during the progress of constructing such bridges, leave an open, uninterrupted navigable waterway, of a specified height and extent. Sects. 42 and 44 provided that the railway company should not make any bridge over the navigation, and, generally, should not interfere therewith, otherwise than as provided for by the act. Sect. 94 empowered the company, subject to the restrictions imposed by the act, to make and maintain the railway, and to construct in, under, upon, across, or over any hills, valleys, roads, rivers, canals, brooks or streams, or other waters, such embankments, bridges, aqueducts and conduits, either temporary or permanent, and to erect and construct such buildings, engines, machinery, apparatus, and other works and conveniences, as the company should think proper.

If a railway company are authorized to erect a temporary bridge for a particular purpose, they may use the bridge for other purposes, provided no additional injury is thereby caused to the navigation.

*Priestly v. Manchester and Leeds R. Co.*

By an agreement made between the companies, and afterwards embodied in an act, the line of railway was changed, by which the navigation was crossed only once by the railway, and only one bridge required. The railway company had introduced into the agreement a clause enabling them to erect temporary bridges across the navigation, but which was struck out by the navigation company. The railway company, having commenced the building of the permanent bridge, erected a temporary bridge adjoining to the permanent bridge, which was used partly for building that bridge and partly for conveying materials across the river. An injunction was granted *ex parte*, restraining the erection of a temporary bridge across the navigation, or of anything impeding the navigation in a manner not authorized by the act. Upon motion to dissolve the injunction, it was decided that, subject to the restrictions of the act, the 94th section ought to be literally carried into effect; that the railway company had the power of erecting such a temporary bridge, the power being exercised reasonably and *bonâ fide*; that, in construing such power with a view to its reasonable and *bonâ fide* exercise, regard must be had to the peculiar purpose for which the permanent bridge was designed; that the temporary bridge, being of the dimensions specified in the 34th section, and a navigable waterway being left, as required by the 38th section, the same was lawfully erected under the 94th section, for the *bonâ fide* purpose of building the permanent bridge; that the temporary bridge, being erected and used for a lawful purpose, might also be used for other purposes, for which alone it could not have been erected; and that, subject to the restrictions of the act, the company, acting *bonâ fide*, were constituted the judges of the mode of executing their works. Injunction dissolved.

*R. v. Rigby (i).*—Indictment against contractors employed by a railway company, for obstructing a turnpike road, by building on it the piers of a railway bridge, and narrowing it thereby. All the counts in the indictment charged the nuisance to be to the carriage road, but nothing was said about the foot road. For forty years before the building of the bridge, the average width of the carriage road, for fifty yards on each side of the spot where the bridge was erected, was twenty-eight feet, and the footpath on one side was eight feet three inches, and on the other, seven feet three inches. The piers of the bridge stood on the footpath on each side; they were each four feet wide, and were built parallel to the line of the carriage road, not directly opposite to each other, as the bridge

Section 40 of the Railway Clauses Act, which prescribes the width of the arch of a bridge over roads, must be construed with reference to the width of the carriage road, excluding foot-paths.

*R. v. Rigby.*

(h) 2 Railw. Cas. 134; 4 Y. & C. 72.

(i) 14 Q. B. 687; 19 L. J., Q. B. 153; 18 Jur. 329.



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was a skew bridge. The effect was, that the carriage road remained as it was before, twenty-eight feet wide, but the footpaths were each narrowed; and the carriage road and footpaths together, which formerly were forty-three feet six inches, were only thirty-six feet. These were the dimensions stated in the case; but if the piers occupy eight feet, it would follow that the total width was only thirty-five feet six inches. Whether the difference of six inches could be accounted for by the circumstance of the piers not being directly opposite to each other, did not appear. These facts were stated on a special case, and after taking time to consider, *Patteson, J.*, said: The prosecutors relied much on the 19th section of the special local act (9 & 10 Vict. c. cxxxiv), which provides, "that in every case in which the railway shall cross the road otherwise than at right angles, the bridges shall be made with skew arches, so as not in any manner to alter the direction of, or interfere with, the line of the said roads, or the footpaths to the same." The object of this section is plain, namely, to prevent the railway company from turning or bending the road, so as to carry it at right angles under any bridge over which the railway passes, and again turning or bending it back on the other side of the bridge to its former direction and line; but the section does not touch or affect any question as to the width of the bridge or the narrowing of the road. The railway company have complied with the section, by erecting a skew bridge. The question in this case depends upon the construction of "The Railways Clauses Consolidation Act, 1845." Now, by that act it is provided, that there shall be a clear space of thirty-five feet, if the arch be over a turnpike road, provided that where the average available width for the passage of carriages is less than the width thereinbefore prescribed, the width of the bridges need not be greater than such average available width, but so as not to be less in the case of a turnpike road than twenty feet. It is further provided, that if the average available width of the road be afterwards increased, the railway company shall increase the width of their bridge, if required, to an extent not exceeding the width of the road so widened, "or the maximum width herein, or in the special act prescribed, for a bridge in the like case or under the railway." Much discussion took place on the argument as to the word "maximum," but the meaning of the Legislature is very plain. Where the average available width for the passage of carriages on any road exceeds thirty feet, it may be narrowed to thirty-five feet under the arch, for the arch is only required to be of that width; where it is less, the arch may be of the same width as the road, so as it be not less than twenty feet; and if the road be afterwards widened, the arch must be proportionably widened up to, but not beyond, thirty-five feet. In the present case, the average available width of the road for the passage of carriages is the same as it was before the erection of the bridge, and the arch is of the same width, and exceeds twenty feet, and the road has not been widened, so as to call on the railway company to widen the arch. Therefore the provisions of the Railways Clauses Consolidation Act appear to have been complied with. No mention is made in that act of footways, as distinguished from the road for the passage of carriages. If they are to be taken as part of the turnpike road, then the road has been narrowed from forty-three feet six inches to thirty-six feet, and the arch of the bridge is only twenty-eight feet, instead of thirty-five. We think, however, that the footpaths cannot be taken as part of the turnpike road, over which the arch of the bridge was to be thrown, within the meaning of these acts of Parliament. There is no pretence for saying that they can be taken into account in ascertaining the average available width of the road for the passage of carriages; and as that width has been preserved as it was before, in strict conformity with the acts of Parliament, it is not true to assert, as every one of the counts in this indictment

ment, does, that persons cannot pass with their carriages as they used to do. The obstruction is to foot passengers only, which is not forbidden by the acts, neither is it charged as the nuisance complained of by this indictment. The cases cited in argument are wholly inapplicable to this indictment. Judgment for the defendants.

*R. v. Birmingham and Gloucester R. Co. (k).*—A railway company were empowered, subject to the provisions and restrictions of the act, to make upon, across, under or over the railway such roads as they should think proper. By sect. 41, when any part of any road should be cut through, raised, sunk, taken, or so much injured as to be impassable, the company, before any such road should be so cut through, &c., were to cause another road to be made instead, as convenient or as near thereto as might be; and when the road cut through, &c., should be a turnpike, the substituted road, if temporary, was to be made and the principal road restored within six months. By sect. 47, where any bridge should be erected for carrying any turnpike road, public highway or occupation road over the railway, the road over such bridge was not to be less than fifteen feet. A mandamus, reciting that the company had (after the compulsory powers given for taking land had expired) cut through a turnpike road forty feet wide, and had made a bridge thereon for carrying it over the railway, the bridge and approaches (which were about 150 yards in length on each side of the bridge) being about thirty feet wide only, commanded the company to restore the turnpike road according to the act: Held by the Court of Queen's Bench, that the company were bound to make the approaches as wide as the turnpike road had been. And held no sufficient return, that the approaches, though of a less width, were as convenient to the public as they could be made in execution of the powers of the act, and as convenient to the public as the original road had been; or that the company could not now widen the approaches without taking and purchasing more land; that their compulsory powers of purchasing under the act had expired before they were called upon to widen; and that they had not then, nor have since had, the power to take or purchase land for such purpose (l). In the judgment the following remarks were made on *Attorney-General v. London and Southampton R. Co.* (9 Sim. 78). "In that case, it is true that his Honor does intimate incidentally such an opinion as has been attributed to him; the question before him then being, whether he should declare by his order a certain archwork of the said company to be a nuisance, and prohibit them from further prosecuting their works, because they were about to abridge the width of a public highway. The point, however, which now comes before us seems to have been very slightly touched in the argument, and was wholly unnecessary for the decision of the Vice-Chancellor, which was, that, provided the said arch be 'not less' than the width prescribed by the act of Parliament, he did not feel himself justified in making the order desired. The Vice-Chancellor also gives as a further reason, that many other methods were open to raise the question (alluding specially to an indictment for a nuisance) without his interference. We cannot, therefore, consider this to have been the deliberate judgment of the Vice-Chancellor upon this subject."

Construction of a special act as to the width of the approaches to a bridge erected across a railway. A return that a railway company cannot obey a writ of mandamus is bad. *R. v. Birmingham and Gloucester R. Co.*

*Attorney-General v. London and Southampton R. Co. (m).*—The act directed, that where any bridge shall be erected for the purpose of carrying any turnpike road over or across the railway, the ascent to such bridge shall not be more than one foot in thirty feet, except where the "present inclination" of such turnpike

Construction of a special act as to the ascent to a bridge. *Attorney-General v. London and Southampton R. Co.*

(k) 2 Q. B. 47; 2 Railw. Cas. 694.  
(l) See *R. v. North Western R. Co.*, 16

Q. B. 864; 20 L. J., Q. B. 399, on this point.  
(m) 1 Railw. Cas. 285.

10. *Cases as to  
Bridges.*

road shall be steeper, in which case the inclination of such road shall not be steeper than the present inclination of such road.

*Shudrell, V.-C.*, decided, that the expression "present inclination" is to be referred to the inclination of a road at the time when taken by the company; that the exception applies as well to a bridge built on a new or diverted road made by the company, as to a bridge built on the site of a previously existing turnpike road; that the relative steepness of a new or diverted road and of an old road, is to be determined, not by their comparative acclivity, measuring the whole length of each from the commencement to the end of the deviation, but by a comparison of the rate of ascent on the new road, from the place of diversion below the bridge to the crown of the arch of such bridge, with the rate of ascent on the old road from the same place to the point on the old road at which, if the two roads had been parallel, the same distance would be attained.

When a street  
may be lowered  
to obtain the ne-  
cessary height  
under a bridge,  
notwithstanding  
the provisions of  
a local paving  
act.

*R. v. Eastern  
Counties R. Co.*

*R. v. Eastern Counties R. Co. (n).*—A company were empowered to raise or lower any roads, in order the more conveniently to carry the same over or under or by the side of the railway. By sect. 100, where any bridge should be erected by the company over any public carriage road, not being a turnpike road, the centre of the arch must be of a height from the surface of the road of not less than sixteen feet. By sect. 120, nothing is to derogate from any of the rights or privileges of any parish over which the railway shall pass, acting under any local act. A local paving act enacted, "That no person shall alter the form of any pavements which shall be now made by virtue of this act without the consent of the commissioners, or in anywise encroach thereon, or put up any posts," &c. A mandamus having issued, a return was made, and the question was, whether the railway company were authorized to lower the pavement of a street for the purpose of giving sufficient headway to a bridge.

*Coleridge, J.*—The commissioners do not dispute the right to carry the railway on the arch, but they deny the right to alter the pavement. If the question stood on the two clauses alone, there could be no doubt. The 9th in express terms contemplates the lowering of the roads; and the 100th, when it limits the steepness of descent under an arch, clearly looks to an alteration of level to be produced by the railway works. But it is said that the powers of the 9th section are expressly given, subject to the provisions and restrictions of the act, and that one of the provisions included is to be found in the 120th section, which provides that "nothing in the act shall extend to prejudice any of the rights or privileges of any parish over which the railway shall pass, acting under any local act." The parish is said to be within these words, because the paving, &c., are by a local act placed under the control of commissioners, in whom the pavements are vested. The same statute enacts, "that no person shall alter the form of any pavement which shall be made by virtue of this act, without consent, or in anywise encroach thereon." If this had been the whole section, it would have been very questionable whether it could have been construed so as to restrain the company from exercising powers plainly given under an act so long posterior in point of time, and which in many instances are so essential to the carrying out the purposes of their act. It would also be very questionable whether a local act, such as the one in question, comes within the meaning of the 120th section of the railway act. But the point is clear when the whole section is looked at. After the words already cited, these immediately follow: "or put up any step, or erect any bulks, or place out any show-glasses, or make any dungholes or sawpit, or other matters, so as to be an

encroachment, upon pain of forfeiting 5*l*." It is clear that this section was inserted merely as a police regulation, to prevent what are commonly called street nuisances and encroachments; and the words "form of the pavement" are well suited for such a purpose. To lower the street and relay the pavement in the same form and of the same dimensions, but on a different level, is scarcely to alter the form of the pavement. Their counsel also relied on a section in the same act, which vests the property of the pavements in the commissioners; but this appears to us immaterial. Judgment for defendants.

*R. v. Sharpe (o).*—A company were empowered "to divert or alter any roads, in order the more conveniently to carry the same over or under the railway." The company, in carrying a road under the railway, had erected a skew bridge, which diverted the road to an angle of 45°, instead of 34°, which was the angle made at that particular point by the old line of road. At the trial of an indictment against the company's engineer, *Alderson*, B. (having consulted *Parke*, B. (p), directed the jury, that, as the only way for the company to resist the charge was, to show that the bridge complained of had been built in conformity with the act of Parliament, the question in substance was, what was the most proper way to construct it. The word "conveniently" meant more conveniently upon the whole for carrying into effect the purposes of the act; and, if the work was done in a mode in which an experienced engineer would construct it, having reasonable regard to the interests both of the company and the public in the construction of it, it was to be looked upon as being in conformity with the intention of the act; that it was, therefore, for the jury to say, whether there was any practical inconvenience arising to the public, by the road being diverted more obliquely than before. If the public would sustain such inconvenience, then, as it was clear that the bridge could be so made, and no inconvenience was added to the public by its not being so made, the verdict should be for the Crown; but, if they thought that no material practical inconvenience was sustained by the public, in having the present bridge instead of the other of 34°, as it would be across the original road, and that an experienced engineer would have so constructed it, having regard to the interests both of the public and the company, they had a right to make such a diversion in building the bridge. The jury found a verdict for defendant; and the Queen's Bench refused a new trial.

Construction of a special act as to the right to erect a bridge at a different angle from the former road.  
*R. v. Sharpe.*

*Wood v. North Stafford R. Co. (q).*—Motion to discharge an injunction. Plaintiffs were owners in fee of large cotton mills and a brewery, and premises, in Macclesfield, immediately adjoining Sutton Bridge, and close to the turnpike road from Langley across Sutton Bridge to Macclesfield. When defendants' bill was before Parliament, plaintiffs opposed it in committee, and an agreement was afterwards entered into and the opposition withdrawn. By the agreement, the compensation to be paid to plaintiffs, and other matters, were to be settled by arbitration. Amongst other things, the arbitrators were to be at liberty to take into consideration loss of trade and interruption to business, and to award a sum

Where a special act required a company to strengthen an old bridge described in the act.—Held, that they might nevertheless pull down the old bridge under their statutory powers, and build a new one. Where an umpire directed a road to be carried in a particular direction, and the company afterwards made the road, but deviated from the line laid down.—Held, that it was only a subject for compensation, if the road was less convenient.

(o) 3 Railw. Cas. 33.

(p) *Parke*, B., said that, in a case which had been tried before him as to the power which a company had to make a railway over a public highway, he laid it down that, "if possible, the work must be constructed without any inconvenience to the public; but if it could not be done without some such inconvenience, it must be

done with the least possible, according to the provisions mentioned in the act." This was *R. v. London and Southampton R. Co.*, tried at the *Hauts Summer Assizes*, 1838, in which his lordship held, that mere expense was no reason for not making a road over the cutting as convenient as before.

(q) 1 Macn. & G. 278.

10. *Cases as to  
Bridges.*

for new buildings ; and to be invested with all powers contained in the Lands Clauses Act, as if the sale had taken place under the compulsory powers of the company's acts. And by the sixth clause, " The arbitrators, in fixing such price, shall at the same time decide upon suitable approaches to be made by the company, to the whole of the premises of the plaintiffs, including the brewery, by a good road on arches from or near Sutton Bridge to the yard, for the purpose of business."

The award was subsequently made and damages given, and the umpire also directed that the company should make a good road on arches, from or near S. Bridge to plaintiffs' factory yard, in the line shown on the plan annexed, such road to be seven yards wide, to be made according to the sections shown on the plan. The lines thus indicated carried the approach to plaintiffs' premises into the road leading over Sutton Bridge into Macclesfield.

When the award was made, the company did not contemplate altering the site of S. Bridge ; but afterwards it appeared more expedient to pull down the bridge, and erect another bridge ; and it then became necessary to divert the turnpike road which led to S. Bridge, and, consequently, to depart from the line marked out for the approach to plaintiffs' premises, by the umpire, and thus to add fourteen yards to the distance, between plaintiffs' premises and Macclesfield.

The injunction had been obtained on the allegation that the substituted road would be very inconvenient to plaintiffs, and would materially injure their premises.

Lord Cottenham, C., said—No doubt, when this award was made, the deviation in question was not contemplated by either party. By the 14th section of the Railways Clauses Consolidation Act, and independently of the agreement, this company has (as all other railway companies have) the power of deviating within certain limits ; and, so far as those limits are concerned, it is admitted that the deviation complained of is within the boundary which the act of Parliament has authorized. It is said, however, that by the 30th section of the special act (*r*), the existence of Sutton Bridge is contemplated. Now the 16th section of the general act authorizing the construction of bridges and other works, is incorporated into the special act ; and the 30th section of the latter must, therefore, be construed in connection with the provisions of the general act ; and I am of opinion, that, so far from interfering, the 16th section is quite consistent with it. The only object contemplated by the 30th section was the security of the old bridge, which, if the railroad were to pass, as it was laid down in the plans, would require additional props, to sustain the greater quantity of earth to be placed upon it. Then with reference to the contract, the plaintiffs contend that it was agreed, that certain communications to their works should be preserved to them, or substituted for those they had previously enjoyed. (His Lordship, after observing that it was no doubt intended that a communication should be preserved, the only point being, whether a deviation having become expedient, and the communication to the plaintiffs' premises being still preserved, though

(*r*) By sect. 30, "the company shall, and they are hereby required to, make and execute, at their own expense, to the reasonable satisfaction of the bridge-master of the county of Chester, all necessary works for the purpose of strengthening the bridge (referring to Sutton Bridge) so as to enable the said bridge to sustain the additional weight which will be occasioned by the

company raising the road leading thereto ; and the company shall, and they are hereby required, at their own expense, to make good any damage which may be from time to time occasioned to the bridge, or to the county road on each side thereof, by the formation of the railway, or any works connected therewith."

not in the precise lines indicated by the award, the company had complied with the award, proceeded as follows) :—There is no allegation that the company has not made the road near to Sutton Bridge in accordance with the letter of the contract, but only that the plaintiffs have not the same use of the high road into Macclesfield, as contemplated by the award. I am, however, of opinion that there is a performance, not only in spirit, but according to the letter of the award ; and if the substituted road is not so convenient a mode of communicating with the plaintiffs' premises into the town, as the one awarded, that is an injury not provided for by the contract, but is a case which expressly comes under the 16th section of the Railways Clauses Consolidation Act, whereby all damage to roads, &c., is the subject of compensation. The injunction must, therefore be dissolved.

*Attorney-General v. Eastern Counties R. Co. (s).*—The special act enacted, that “where any bridge shall be erected by the company for the purpose of carrying the railway over or across any turnpike road, the span of the arch of such bridge shall be formed, and shall at all times be and be continued, of such width as to leave a clear and open space under every arch of not less than twenty-five feet.”

Temporary  
bridge.  
*Attorney-General  
v. Eastern  
Counties R. Co.*

The company erected a temporary bridge across a turnpike road by the side of a permanent bridge, for the purpose of carrying spare earth over the road, whereby the road was narrowed to less than twenty-five feet under the bridge, and an injunction was thereupon applied for to prevent the company from using the bridge.

*Knight Bruce, V.-C.*—I am of opinion that, although the bridge is a temporary one, and adjoining the regularly made bridge, yet sect. 100 has not been complied with, and, on that ground at least, what has been done is illegal ; and taking the whole act together, I think there has been an infraction of the law, and that, too, without any favourable circumstances. No case of great practical inconvenience has been made out, and I do not think it necessary to interfere by injunction. The court will exercise its discretion according to circumstances, and although there may have been an infraction of the law, it will endeavour to do substantial justice to one party without imposing unnecessary hardship on the other, especially in a case where the legal tribunals are open. [His Honor suspended the injunction, and put the company under terms.]

## 11. Cases Relating to the Diversion, etc., of Roads.

### 11. Cases as to Roads.

*Attorney-General v. London and South-Western R. Co. (t).*—Motion for injunction. Defendants were constructing their railway, which crossed the turnpike road, in a slight cutting of about one foot six inches ; and had begun to carry the road over the railway by means of a deviation and bridge ; and at the place where the proposed railway was to cross the road, and for a very considerable distance on each side thereof, the road led across a flat and in a straight line ; and there was no necessity, for the purpose of passing over the railway, that the road should be diverted from the straight line, and any such diversion would occasion considerable inconvenience to the public ; but the company intended to divert the road from the straight line, carry it from the then present line of road

Injunction  
issued against a  
company for not  
making a road  
equally conve-  
nient as a former  
road under a. 60.  
*Attorney-General  
v. London and  
South-Western  
R. Co.*

(s) 3 Railw. Cas. 337.

(t) 3 De G. & S. 429.

11. *Cases as to  
Roads.*

on the north side of the railway, by a sharp curve up to the bridge, and, having crossed the bridge, to return into the then present line of road again, by another sharp curve. The engineers and surveyors, on behalf of the information, deposed, that, at a comparatively trifling extra cost, the company could have carried the road over the railway, by a bridge in its present line, by raising the road as it approached the bridge for some distance on either side; and that this was the only plan whereby the road could be made as nearly convenient as the circumstances allowed, within the meaning of the Railways Clauses Act (sect. 56).

In a negotiation between the trustees of the road and the company, the former proposed, that, to lessen the curve, the company should add a pier at each side of the bridge (which was then already erected) nearest the road, and purchase some of the land, which was common land, adjoining the road at each end of the bridge, still further to lessen the curve at the junction with the old road. The company refused to comply with this suggestion, but offered to refer the question to the Board of Trade. This offer was declined, and the information was filed at the relation of the trustees.

*Knight Bruce, V.-C.*—The question is, whether in their proposed works the company are doing as little damage as may be, or whether it can be said that the road intended to be substituted for the road taken away is, in the language of the 56th section, “equally convenient as” the former road, or as near thereto as circumstances will allow.

The impression made by the evidence upon my mind is, that the company are not doing as little damage as may be; and that the road which they propose to substitute is not “as convenient as” the former road, or as near thereto as circumstances will allow. They are intending that which, in my view of the facts and of the law, is wrong; and it is a wrong of a nature, which I understand it to be the office of this Court to restrain.

It has been said, and perhaps justly, that all the court can correctly decide upon this motion is, that what the company are doing is what the court thinks not right, whilst the court cannot point out to the company what they ought to do. I do not see how that is to be avoided, except by stating the reasons which induce the court to come to its conclusion, or the manner in which it appears to the court, that that which seems an evil can be remedied.

Now, the grounds upon which I proceed are, that the avowed plan of the company makes a curve, or rather curves, upon the substituted road, inconveniently and unnecessarily sudden; that this suddenness might be removed, and the curve or curves made easier, without any unreasonable or heavy expense, and without any extraordinary difficulty.

There appear to me two ways of avoiding this inconvenience—either to increase the width of the surface at the ends of the approaches of the bridge, in the manner suggested, with other works of a slight description accompanying it, which, according to my present opinion, subject to anything that the relator’s counsel may say, I consider the company not bound to provide; or if the company do not think fit to adopt that course, they may, I apprehend, by lengthening the new portions of the road, and by acquiring more land for the purpose from the common, make the curve sufficiently easy, and sufficiently convenient for the public, without altering or adding to the bridge. Because I think that that which is required for the public convenience may be effected in one of these ways, I am of opinion that the present injunction ought to be granted, without prejudice to any application which either party may make to the Railway Commissioners.

*Attorney-General v. Ely, Haddenham and Sutton R. Co. (u).*—Information at the relation of ten inhabitants of Thetford, owning lands in Grunty Fen, praying that the defendants might be restrained from obstructing the Grunty Fen road, or, at any rate, from obstructing it until they had made another road equally convenient; and that they might be ordered to construct all necessary bridges and other works.

It appeared that the defendants were empowered to carry their railway across the turnpike-road from Ely to Cambridge by a level crossing. The line also crossed a road from Thetford to Grunty Fen, not far from the place where the level crossing would be made. The company diverted the Grunty Fen road, taking it for some distance parallel to the railway; then across the railway at the above-mentioned level crossing, and then back into the Grunty Fen road; the altered road being altogether about 150 yards longer than the old road, and making two sharp turns. The whole road was on a dead level. The company produced evidence that the arrangement they had made was more convenient for the public than that proposed by the relators, which would take the road over a bridge at least seventeen feet high.

Lord Romilly, M. R., dismissed the information.

Lord Hatherley, L. C.—“I have examined the different sections of the Railways Clauses Act, and it appears to me that there is a mode by which they can be very well reconciled, if reconciliation be needed. By the 16th section the Legislature has conferred large powers upon railway companies in dealing with public roads, but has made these powers subject to the other provisions in the act, and to the provisions in the special act. By this section the company is empowered to divert or alter, as well temporarily as permanently, the course of any roads, streets or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper.

“What seems to me to have been intended by the Legislature, taking the two clauses together, is, that if the company, in making the railway and carrying it along its course, are obliged either to carry it over or under or alongside a road, then in constructing the line they shall have the power of diverting the road for all or any of those purposes. They may carry it parallel with the railway and on a level with it for a certain distance, so as to pass the railway afterwards, where they would not be prevented by the 46th section. The 46th section was intended to grant protection to the public against the railway crossing public roads at a level, and there is nothing to prevent the company from permanently diverting a road under the powers of the 16th section, so as to bring the crossing to a point where the levels would be more suitable for a bridge or tunnel, or, as in this case, to a point where a level crossing is permitted by the special act. For instance, where the railway meets a very ill-made country road, which pursues an extremely tortuous course, it would be very absurd for the railway to cross that road and recross it at every turn. In that case the company would, under the 16th section, divert the road by carrying it parallel and always on one side of the railway until it came to a place where it was necessary to carry it across in order to complete the arrangement for traffic. In some cases they might so widen and divert the road as not to cross it at all, and that of course would be much better.

“The act, in fact, says this: If you require to divert a road and carry it parallel to your railway, without interfering with the traffic along it, and lead it on fairly and reasonably to its terminus, instead of crossing it over and over

A highway may be diverted to a place where a level crossing has been authorised by the special act, if the road so diverted will be more convenient than a bridge.

*Attorney-General v. Ely, Haddenham and Sutton R. Co.*



11. *Cases as to Roads.*

again, you are at liberty to do so; but if you do not choose to do so, then, according to the 40th section, every time you cross the road you must make a carriage-road over or under the railway. If you take a part of the road and use it permanently as part of the railway, then, under the 56th section, you must make a new road as convenient as may be.

"It was argued that this road was scarcely used as a road to Grunty Fen and was only used as a road to Ely, but it is clear that the Grunty Fen road was a road which persons were always entitled to use before the turnpike road was thought of, and those who used it cannot be told that they are accommodated by the Ely road, or that they are less numerous than those who go by the public road to Ely. The rights of those going to Grunty Fen cannot be destroyed on the plea of giving additional benefits to those going in another direction. As to the argument that the Attorney-General represents the whole public, he represents the whole public in this sense, that he asks that right might be done and the law observed. The law is not observed by giving advantages to persons going to Ely to the detriment of those going to Grunty Fen. The question is, whether what has been done has been done in accordance with the law: if not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed.

"The court is not setting itself up as an engineer, but is construing this act of Parliament, and in doing so I cannot but see that this road must be diverted one way or the other, either vertically or horizontally: that if it is diverted vertically it will be necessary to drag waggons up a height of seventeen feet; while if it is diverted horizontally, those who use the road will only have occasion to turn two sharp corners and go round a short distance. I must come to the conclusion that the act has been fairly complied with, and, by the joint operations of the 56th and 16th sections, that has been done by the defendants which is required by law to be done. I come to the same conclusion as the Master of the Rolls; possibly not exactly for all the reasons expressed by him, although I am not at all clear that his view was not precisely the same in substance as mine. At all events, I come to the conclusion that the decree was right, and that the appeal must be dismissed with costs."

1. What is a sufficient substituted road.
2. A memorandum on the plans and sections that a road is to be stopped and another road used in lieu thereof, does not amount to a licence to the company to stop the road.
3. Where an injunction was disobeyed and a sequestration ordered.

*Attorney-General v. Great Northern R. Co.*

*Attorney-General v. Great Northern R. Co. (x).*—Information for obstructing a public highway. The bill stated that the company were interfering with a public road, by digging a trench and lowering the level of it, and causing a permanent and complete obstruction thereof; and prayed for an injunction restraining them from obstructing the road, or rendering the same less convenient for the passage of carriages, &c., than it had previously been, until they made a proper substituted road.

Upon the plans and sections deposited with the clerk of the peace, in pursuance of Standing Orders, and referred to by the special act, Crab Lane (the road which was stopped) was coloured blue; another lane, called Rose Lane, was coloured green; and the following note was inserted upon the plan: "Note—Road to be stopped, coloured blue; road to be used in lieu thereof, coloured green." Conflicting affidavits were made as to whether Rose Lane was an adequate substitute for the obstructed road, and also as to other facts.

*Knight Bruce, V.-C.*—Upon the dispute in this case, so far as any legal point is involved, either party is entitled to take the judgment of a court of law; the only question before me is, what ought to be done in the meantime.

(x) 4 De G. & S. 75. See also *R. v. Wycombe R. Co.*, 36 L. J., Q. B. 121.

Now, on the words on the plans and sections, I am of opinion that nothing material for any present purpose arises.—They seem to me not to confer a right which, without them, would not have existed; and I think also, that they do not give that kind or degree of notice which would be sufficient, on the ground of laches or acquiescence, to impede the action of the court between the contending parties.

Then comes the question of the right permanently to stop this road without any substitution. So far as I can with propriety, in the present stage of the cause, give an opinion upon the law, I think that a right to stop this road permanently, with or without a substitution, has not been shown to exist.

The question then arises, whether the existing road, called Rose Lane, can be treated as a substituted road for the present purpose, during the temporary stoppage of Crab Lane; and I think that it would be a most perverted construction of the act to say that the existing road ought to be so treated. The plaintiff is, therefore, entitled to an injunction to secure to him the passage, either along this road or along a substituted road, not being Rose Lane, while these works are going on, or until the opinion of a court of law can be obtained. The order may be agreed on between the parties. It cannot be necessary to put the company to any useless inconvenience, nor can an injunction be proper which should command an impossibility.

After this injunction had been granted, the company removed the embankment, and proceeded to form their line across Crab Lane on a level. They erected two posts on each side of their railway, and fences extending from the posts towards the sides of the road. The defendants hung gates on the posts. They also opened their line of railway for public traffic, and the gates were kept shut when trains were expected to pass on the railway crossing the highway.

Upon these new facts a motion was made for a sequestration, for a breach of the injunction by erecting the posts, and fences and gates across the highway, and by crossing the lane on a level. And it was insisted that, besides being a breach of the injunction, this proceeding was contrary to 8 & 9 Vict. c. 20, particularly sects. 48 and 53. It appeared that the company had not obtained the consent of the justices in petty sessions, authorizing them to cross the highway at a level, under sect. 56, and the Board of Trade had not given a certificate, enabling the company to modify the construction of the road under sect. 66.

*Knight Bruce, V.-C.*—When the injunction was granted the rails were, as I understand the facts, used only for purposes connected with the construction of the railway, and not for the conveyance of passengers or goods; not for what, in the language of the business, is called traffic. But the railway having been opened for public use, it is clear that obstruction and impediment to the free use of the turnpike road are thus caused to a greater extent than was the case at the time of granting the injunction, and, in a sense, differently; and this, independently of the gates. But the gates, however necessary or valuable they may be, for the purpose of protecting life, do, as it appears to me in the sense in which plainly the words “obstructed,” “impeded,” and “hindered,” are used in the injunction, obstruct the turnpike road—do create such an impediment and hindrance as the injunction has plainly forbidden.

I assume that the Railway Commissioners have sanctioned the opening of the railway for public use, and that they did so upon condition that the defendants should erect the gates. But if the commissioners could, by any order or act of theirs, have rendered the defendants' present use of the turnpike road, or mode

11. *Cases as to Roads.*

of dealing with it, lawful against the right or interests which it is the object of this suit to protect, they have not been proved to me to have done so, or to have professed or intended to do so. My impression is, that the case before me is not in the least degree affected by anything that they appear to have done.

Then comes the question what, if anything, the court ought to do in consequence; for it does not necessarily follow that the process asked must issue. It was upon the defendants, however, to make a case to exempt them from it; and perhaps if they had shown their proceedings not to be plainly and clearly illegal, I mean illegal independently of any question of contempt, or had satisfied the court that the injunction ought not to have been granted at all, or ought to be dissolved, discharged, or put into a shape more favourable to the defendants than it is, or had stated that they had appealed from it, or from the order granting it, or intended to do so, I might have declined or delayed to direct process to go. But none of these things have been done. On the contrary, my belief is strengthened of the utter impropriety (without any reference to the injunction or this suit) of the acts alleged to be also a contempt of the court; my opinion is more fixed, that the injunction, if it goes far enough, does not go too far against the defendants, and is one of which they cannot justly complain. Considering, then, their conduct to be at once contumacious and otherwise illegal, to be wrongful against the plaintiff individually, wrongful against the Queen's subjects at large, and of—I had almost said—scandalous example, whatever amount of inconvenience may be the consequence of acting against the defendants on this occasion, I think it right to deal with them according to their merits. The consequence may possibly be to stop the railway; I answer again, that it ought to be stopped, for it passes, where it does, by wrong.

The directors of the company and their agents cannot, on this motion, at present be committed to prison. But what can be, shall be done, to repress a daring invasion of private and public rights, maintained in open defiance of law, authority and order. Let a sequestration issue.

Upon appeal to the *Lord Chancellor*, the company undertook to carry the road, called Crab Lane, over the railway, and in the meantime to provide a convenient substituted road, in the manner directed by the Railway Clauses Act; and on payment of costs all further proceedings were stayed.

Any special stipulations as to the mode of constructing works should be embodied in the railway act, or be made the subject of an agreement between the parties.

*Aldred v. North Midland R. Co.*

*Aldred v. North Midland R. Co. (y).—*The trustees of a turnpike road agreed to assent to a bill in Parliament, on condition that the railway should pass over the road at a sufficient elevation, and that the road should not be lowered or otherwise prejudiced. This qualified assent was given in both Houses of Parliament, and the bill passed. Sect. 12 of the act, among other powers, authorized the company to raise and sink roads or ways, in order the more conveniently to carry the same over or under or by the side of the railway. Sect. 72 enacted, that the arch of any bridge, for carrying the railway across any turnpike road, should be of a height, from the surface of such road to the centre of such arch, of not less than sixteen feet, provided that the descent under any such bridge should not exceed one foot in thirty feet. The act contained no particular proviso as to the road in question.

It was decided by *Shadwell, V.-C.*, that the modified assent of the road trustees—the terms of which were neither embodied in any agreement between the trustees and the company, nor adopted by the Legislature—afforded no equitable ground for restraining the company from enforcing, with regard to the road in

question, all the powers conferred by the act ; and that the company were authorized to sink the original surface of a turnpike road, in order to give the specified elevation to the arch of a bridge erected for carrying the railway over such road, notwithstanding that the effect, from the peculiar situation of the road, would be to render it liable to be occasionally flooded.

*Breynton v. L. and N. W. R. Co. (c).*—An injunction had been obtained to prevent defendants from lowering a turnpike road, so as to make it pass under the railway, instead of crossing it on a level. By the special act, the company were authorized to construct the railway across and on the level of the turnpike road in question, and it appeared that, according to the plans deposited, the company proposed to take part of plaintiff's lands adjoining the turnpike road, and the plans showed that the railway was to pass over plaintiff's lands, on an embankment above the level of the land and road, and that it was intended to raise the road, so as to pass the roadway on a level.

Under these circumstances, the company, by an agreement, purchased plaintiff's lands, and the agreement recited that the company were desirous of making the purchase for the purpose of constructing the railroad "according to a certain plan and section thereof deposited." On motion to dissolve this injunction,

Lord Langdale, M. R., said—Two distinct questions arise. The first as to the power conferred by the acts of Parliament, and the second as to the obligations which the company have entered into with the plaintiff.

It is the duty of the Court to take care, on the one hand, that public companies, when interfering with the private property of individuals, do not exceed the power conferred on them by the Legislature ; and, on the other, to see that the companies be not impeded in the due exercise of those powers which the Legislature clearly intended to confer upon them.

I was very much struck with the peculiarity of this application. It was the first time that a complaint had been made that a company, possessing the power of crossing the roads of the country at a level, were desirous of not exercising it, preferring, under their powers, to make roads pass under or over the railway. No one can have attended to this subject without knowing that the public have a very great interest in preventing the common roads being crossed by a railway on a level.

The facts of this case are, that by the Railways Clauses Consolidation Act, two of the powers which had formerly been inserted in the particular acts—namely, the powers of making lateral and vertical deviations—are given to the company (sects. 14, 15). Powers are also given of making works of a particular kind, and especially those referred to in the 16th section, by which, subject to the provisions contained in the general act, and in the special act, power is given to do a great variety of things, including a distinct power to carry a road underneath the railway. Is there anything in this general act to the contrary ? I am of opinion there is not. Is there anything to the contrary in the provisions of the special act ? It is said that the clause is, which refers to the deposited plans ; but, on looking at it, I am of opinion that the enacting part does not abridge that power. It provides that the line shall be observed ; and, in this case, it is not proposed to alter it in any respect whatever, either by making a lateral or vertical deviation. Then what is there which constitutes a legislative provision, that this power conferred by the general act is not to have its operation ? It is said, that, on the

An agreement recited that a company were desirous of making a purchase of lands to make a railway, "according to a plan and section deposited," and the plan showed that a railway was to cross a turnpike road at a level :—Held, that although the special act authorized the road to be so crossed on a level, the company were entitled to carry the road under the railway ; and, *quære*, whether a company can by a private arrangement contract itself out of powers entrusted to them for the public good.

*Breynton v. London and North Western R. Co.*

11. *Cases as to Roads.*

plan which was deposited, the road in question was designated as a road, which was to pass at a level, and that, by a clause in the special act, permission was given for that purpose; but I cannot conceive that the Legislature intended by that clause to restrict, in any way, the powers given by the preceding act. The agreement which the parties entered into was to refer to arbitration the question of value, and the amount of loss and damage. It refers in the recital to the special act, and by so doing must include every portion of it; consequently those portions of the general act which are expressly incorporated in it. Looking, however, at that agreement, I am of opinion there is nothing in it which can even tend to diminish the power which the company derived under the acts of Parliament.

Though the point has not been argued, I must say I do not think it perfectly clear, that a company having a power given to it plainly for the public good, but which may effect an injury on an individual in respect of which compensation can be given, has a right to contract itself out of those powers (a). On a proper occasion the matters ought to be most carefully considered. I certainly have never felt the least disposition to extend the powers of railway companies; and I believe it would be for their own and for the public advantage if those powers were less than they seem to be; but if they have powers given them for the public benefit, such, for instance, as to make a road under, instead of across a railway, I do not feel satisfied that they have the right or power to contract themselves out of it, by a private agreement with any individual whatever.—*Injunction dissolved.*

If surveyors of highways object to a road which has been substituted for a former road they are not authorized to obstruct it, but must enforce the usual legal remedies (b).

*London and Brighton R. Co. v. Blake.*

*London and Brighton R. Co. v. Blake* (c).—The L. and B. R. Act (sect. 59), after reciting that it was intended to carry the railway across certain public roads in the parish of Croydon, and to alter the present surface of such roads, enacts that all alterations, whether temporary or permanent, of any of the said public roads, and all works connected therewith, and all bridges to be erected, and all future repairs of such altered roads, or of any temporary roads, and the quality of the materials to be used and applied, in or to such altered or temporary roads, and all future damage to such altered or temporary roads, shall be made, completed and finished under the superintendence, from time to time, and to the entire satisfaction of the board of surveyors of roads for the parish of Croydon. By sect. 60, "If the company shall, in the doing, making, completing and finishing all, or any, or either of such alterations or works in, to, or belonging to the said public roads, do or cause any injury or damage to any of the said roads, or to any part thereof, and shall not forthwith proceed to repair and make good such injury or damage, to the satisfaction of the board of surveyors of the parish of Croydon, or if the roads so to be altered shall not be properly made and completed and kept in repair, it shall be lawful for the said board of surveyors to cause such repairs to be done." The company made a diverted temporary road leading from one of the said roads, which diverted temporary road was crossed by the railway. The railway did not cross the old road, neither did the company alter the level or surface of the old road. The company also made and tendered to the surveyors a permanent diverted road,

(a) See *Attorney-General v. Corporation of Plymouth*, 9 Beav. 67.

(b) The Highway Act, 5 & 6 Will. 4, c. 50, s. 82, and following sections, authorizes justices of the peace to divert existing highways under certain conditions. See

as to the construction of these sections, *R. v. Newmarket R. Co.*, 19 L. J., M. C. 241; 15 Q. B. 702; *R. v. Justices of Worcestershire*, 3 E. & B. 477; *R. v. Local Board of Midgley*, 33 L. J., M. C. 188.

(c) 2 Railw. Cas. 322.

which the surveyors refused to approve of or accept. The company having, in the execution of their works, crossed the temporary diverted road with locomotive engines, the surveyors put up fences on either side, so as to obstruct the passage across it :—Held, by *Shadwell*, V.-C., that even if the surveyors had, under sects. 59 and 60, jurisdiction to determine in what manner the diverted permanent road should be made, they were not justified in putting up the fences across the temporary road, but ought to have applied to equity for an injunction, or to a court of law for a mandamus ; and that the right of the surveyor was a private right, the surveyors being in no way interested in the question of public safety.

Whether, upon the true construction of the act, such diverted temporary road was an alteration of a road within the meaning of sects. 59 and 60—*quære*. This case compromised.

*London and Brighton R. Co. v. Cooper* (2).]—The preamble of an act, after reciting that the establishment of a railway communication between London and Brighton would be of great public advantage, enacted (sect. 3), that it shall be lawful for the company to make a main line of railway and branches, with all proper warehouses, wharfs, and all other suitable works, communications, approaches and conveniences attached to or connected with the same. By sect. 12, the usual powers are conferred for making and maintaining the railway, and to make upon, across or over any roads &c., such roads, ways, cuttings, &c., as the company shall think proper. The company having purchased a private wharf, separated from one of their terminus stations by a turnpike road, laid down on the road stone blocks, so as to form two runs or stone-ways, level with the road, for the purpose of facilitating the passage of goods from the wharf across the road to the station. It was decided, that the company were not authorized to interfere with the road in such a manner ; and an injunction which had been granted to restrain the trustees of the road from removing the stone blocks was dissolved, although, in the opinion of the court, no damage could result from the stone blocks, either to the road, or the passengers upon it.

Construction of a special act, as to the powers of the company to lay down runs on a road adjoining to the railway, for the transit of goods to a wharf.

*London and Brighton R. Co. v. Cooper.*

Lord *Cottenham*, C., said—“ The question is, whether I can find in this act any reasonable doubt that what the company have done is supported by their act ; and after paying great attention to the clauses to which I have been referred, I cannot find any one which gives them even a colour of title. The 12th section, no doubt, is as large as possible in describing what the company may do : but there are those words at the commencement which limit the whole operation : it must be for the purposes and subject to the provisions and restrictions of the act. Not only, therefore, must you find words in the enacting clause, sufficient to justify what is done, but you must find that what is intended to be done, under that power, is for the purposes and subject to the provisions and restrictions of the act. [Here his Lordship described the works complained of.] However, this is not for the purposes of the railway itself, and is therefore not a work within the meaning of the section. There are provisions enabling the company to deal with the turnpike road, if it is for the purposes of the railway ; but if they wish to make another road, they cannot take the turnpike road for that purpose. What the company have done to this road is not for the purposes of the act, or within its provisions. If it is a common road of communication made for the purposes of an easy access to the railway, then I do not find anything in the act authorizing the company to deal with the road at all.”

12. *Cases as to Repairs.*

A company under an act of Parliament destroyed a ford, and substituted a bridge:—Held, that they were liable to keep the bridge in repair.

*R. v. Kent.*

12. *Cases relating to the Repairs of Works.*

*R. v. Inhabitants of Kent (e).*—The Medway Navigation Company, being empowered under a local act (16 & 17 Car. 2) to make the river navigable, and to take tolls, and “to amend or alter such bridges or highways as might hinder the passage of navigation, leaving them or others as convenient in their room,” &c., and having forty years ago destroyed a ford across the river in the common highway, by deepening its bed, and built a bridge over the same place, it was decided that they were bound to keep such bridge in repair.

Lord *Ellenborough*, C. J., said, “Here the statute gives power to the company to take or alter the old highway for their own purposes, upon condition of leaving another passage as convenient in its room; and if they do not perform the condition, they are not entitled to do the act. It is a continuing condition; and when the company thought proper, for their own benefit, to alter the highway in the bed of the river, so that the public could no longer have the same benefit of the ford, they were bound to give another passage over the bridge, and to keep it for the public.”—*Le Blanc* and *Bayley*, JJ., concurred.

Liability to keep level crossing in a proper state.  
*Oliver v. North Eastern R. Co.*

*Oliver v. North Eastern R. Co. (f).*—Where a railway company construct their line across a highway on a level under the sanction of an act of Parliament, it is their duty to keep the crossing in a proper state for the passage of carriages across the rails, and if a carriage is damaged, in consequence of the rails being too high above the surface of the roadway, the company are liable to an action. In this case the Court of Queen’s Bench held that the principle of *R. v. Kerrison* (supra) was expressly in point.

A railway bridge which lets water through on to the street below, is not a nuisance within the meaning of the Public Health Act.  
*Great Western R. Co. v. Bishop.*

*Great Western R. Co. v. Bishop (g).*—A railway bridge, the bottom of which was formed of wooden planks, through which dirty water percolated on to the street below, was held not to come within the definition of “any premises in such a state as to be a nuisance or injurious to health,” so as to render the company liable to be summarily proceeded against under “The Nuisances Removal Act, 1855” (h), although it might be an indictable nuisance.

13. *Negligence in constructing Works.*

Where a company employed a contractor to build a viaduct over a road, and a stone fell on a passenger and killed him:—Held, that the company were not liable to be sued for the negligent acts of the workmen employed by the contractor.

*Reedie v. L. and N. W. R. Co.*

13. *Cases relating to the Liabilities of the Company and their Contractors, for Injuries arising from Negligence in Construction of the Works (i).*

*Reedie v. L. and N. W. R. Co. (h).*—Action by the widow and administratrix of R., to recover damages under 9 & 10 Vict. c. 93 (Lord Campbell’s Act). The

(e) 13 East, 220; and see *R. v. Inhabitants of Lindsey*, 14 East, 317.

(f) 1 L. R., 9 Q. B. 409.

(g) 1 L. R., 7 Q. B. 550; 41 L. J., M. C. 120.

(h) Deepened, except so far as relates to the Metropolis, by “The Public Health Act, 1875” (38 & 39 Vict. c. 55), s. 343, and schedule 5, which, however, contains the same provision in sect. 91.

(i) See also the cases cited in Manley Smith’s Law of Master and Servant, 2nd ed. p. 201 et seq. See also *Strel v. South Eastern R. Co.*, 16 C. B. 550. In *Hole v.*

*Sittingbourne and Sheerness R. Co.*, 30 L. J., Ex. 81, the company were held liable for an obstruction caused by a contractor building a swing bridge which they were authorized to build. See also *Guy v. Pullen*, 32 L. J., Q. B. 169, reversed in Ex. Ch., 34 L. J., Q. B. 265; *Blake v. Thirst*, 32 L. J., Ex. 188; 8 L. T. N. S. 251; *West Riding and Grimsby R. Co. v. Wakefield*, 33 L. J., M. C. 174. As to the measure of damages, see *Workman v. Great Northern R. Co.*, 32 L. J., Q. B. 279.

(k) 4 Exch. 244; 20 L. J., Ex. 65; 18

declaration stated that the company were possessed of a viaduct over a turnpike road, yet the defendants conducted themselves, in the constructing of the said viaduct, in so careless a manner, that by reason thereof a large stone fell upon R., who was then lawfully passing under the said archway, and killed him.

At the trial, it appeared that R. was passing under the viaduct, which was in the course of erection, when some workmen, employed by the contractors in the execution of the works, forced a block of stone off the parapet, which struck and killed R. on the spot.

By an act passed in 1845, a company was incorporated for the formation of the railway in question. By a deed, made between the company of the one part, and Messrs. Crawshaw of the other part, the Messrs. C. covenanted to make and complete a portion of the railway and works connected therewith, according to the specifications; and it was provided, that the company should have a right of watching the progress of the works, and, if the contractors employed incompetent workmen, the company should have the power of dismissing them. Messrs. C. proceeded to execute works, and, while they were in progress, another act passed, whereby it was enacted that the railway, with the undertakings thereof, as well as those which had been commenced, as those which had not, and all the real and personal estate of the company, should (subject to the existing debts, liabilities and contracts of the company) be vested in the defendants, and might be lawfully executed by them in the same way as they might have been executed by the said first-mentioned company. After the passing of this second act, Messrs. C. proceeded with their work, and during that time the accident occurred. Verdict for plaintiff, leave being reserved to move to enter a non-suit.

Rolfe, B., delivered the judgment of the court.—It appears to us quite clear, that after the passing of the second act, the contract with Messrs. C. was transferred to the present defendants, so as to make them liable to the same extent precisely, as the original company would have been, if the second act had not passed. But, after full consideration of the subject, we are of opinion that neither the defendants nor the original company are liable. In *Quarman v. Burnett* (l), this court decided, that the liability to make compensation for an injury arising from the neglect of a person driving a carriage, attaches only on the driver, or on the person employing him. The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim—“*Qui facit per alium facit per se*.” The party employing has the selection of the party employed; and it is reasonable, that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned. The doctrine of *Quarman v. Burnett* has since been acted on in *Rapson v. Oubitt* (m), in *Milligan v. Wedge* (n), and again in *Allen v. Haywood* (o). By these authorities, we must consider the law to have been settled; and the only question is, whether the law so settled is applicable to the facts of this case. To show that it was not, it was argued, that there is a recognized distinction on this subject between injuries arising from the careless or unskilful management of an animal or other personal chattel, and an injury resulting from the negligent management

Jur. 659; 6 Railw. Cas. 184. This case has been followed in America, *Simons v. Monier*, 29 Barbour's Rep. 420.  
(l) 6 M. & W. 499.

(m) 9 M. & W. 710.  
(n) 12 A. & E. 737.  
(o) 7 Q. B. 960.



18. *Negligence in  
constructing  
Works.*

of fixed real property. In the latter case, it was contended that the owner is responsible for all injuries to passers-by or others, howsoever they may have been occasioned; and here it was said, that the defendants were, at the time of the accident, the owners of the railway, and so are the parties responsible. This distinction as to fixed real property is adverted to by Mr. Justice *Littledale*, in his very able judgment in *Laugher v. Pointer* (p): and it is also noticed in *Quarman v. Burnett*. But in neither of these cases was it necessary to decide whether such a distinction did or did not exist. The case of *Bush v. Steinman* (q), where the owner of a house was held liable for the act of a servant of a sub-contractor, acting under a builder employed by the owner, was a case of fixed real property. That case was strongly pressed in argument, in support of the liability of the defendant, both in *Laugher v. Pointer* and *Quarman v. Burnett*; and as the circumstances of these two cases were such as not to make it necessary to overrule *Bush v. Steinman*, if any distinction in point of law did exist in cases like the present, between fixed property and ordinary moveable chattels, it was right to notice the point. But, on full consideration, we have come to the conclusion that there is no such distinction, unless perhaps in cases where the act complained of is such as to amount to a nuisance; and, in fact, that, according to the modern decisions, *Bush v. Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded.

It is not necessary to decide, whether, in any case, the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others, not standing in the relation of servants to him, or part of his family. It may be, that, in some cases, he is so responsible. But then his liability must be founded\* on the principle, that he has not taken due care to prevent the doing of acts, which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house, or a field, should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbours, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law—"Sic utere tuo ut alienum non ledas." This is referred to by Mr. Justice *Cresswell*, in delivering judgment in *Rich v. Basterfield* (s), as the principle on which parties possessed of fixed property are responsible for acts of nuisance occasioned by the mode in which the property is enjoyed. And, possibly, on some such principle as this, ~~the case of *Bush v. Steinman*~~ may be supported. But certainly that doctrine cannot be applied to the case now before us. The wrongful act here could not, in any possible sense, be treated as a nuisance. It was one single act of negligence, and, in such a case, there is no principle for making any distinction, by reason of the negligence having arisen in reference to real and not to personal property. If the defendants had employed a contractor carrying on an independent business, to repair their engines or carriages, and the contractor's workmen had negligently caused a heavy piece of iron to fall on a bystander, it would appear a strange doctrine to hold, that the defendants were responsible. Mr. Justice *Littledale*, in his very able judgment in *Laugher v. Pointer*, observed, that the law does not recognize a several liability in two principals, who are unconnected; if they are jointly liable, you may sue either, but you cannot have two separately liable. This doctrine is one of general application, irrespective of the nature of the employ-

(p) 5 B. & C. 559.  
(s) 4 C. B. 802.

(q) 1 B. & P. 404.

ment ; and, applying the principle to the present case, it would be impossible to hold the present defendants liable, without at the same time deciding that the contractors are not liable, which it would be impossible to be contended. It remains only to be observed, that in none of the more modern cases has the alleged distinction between real and personal property been admitted. In *Milligan v. Wedge*, Lord Denman expresses doubt as to the existence of such a distinction in any case ; and in the more recent case of *Allen v. Hayward*, the judgment of the court proceeded expressly on the ground that the contractor, in a case like the present, is the only party responsible. The last case so closely resembles the present, that even if we had not considered the decision right, we should probably have felt bound by it. But we see no reason to doubt its perfect correctness. It seems to follow as a necessary corollary from the principle of the preceding cases, and entirely to govern this.

Our attention was directed to the provisions of the contract, whereby the defendants had the power of insisting on the removal of careless or incompetent workmen ; and so it was contended they must be responsible for their non-removal ; but this power of removal does not seem to us to vary the case. The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal, if they thought him careless or unskilful, did not make him their servant. In *Quarman v. Burnett*, the particular driver was selected by the defendants ; but this was held not to affect the liability of the driver's master, or to create any responsibility in the defendants ; and the same principle applies here. On these grounds, this rule must be made absolute.

[In the next case in this collection (*Knight v. Fox*), Parke, B., speaking of the judgment in the above case, says, " that means a nuisance existing in a man's fixed property, as if the defendants had been the owners of the bridge, and in consequence of want of repair something fell from it and injured a passer-by, then it would be a question whether they would not be liable."].

*Knight v. Fox* (t).]—Case against defendants for negligence. The declaration stated that defendants were, by themselves and servants, in the course of erecting a railway bridge over a public street and highway, and for that purpose had erected a scaffold upon the highway. It then stated that defendants negligently fixed a piece of timber across the footpath of the highway, and kept it there by night and day, without any light or other guard or precaution to warn passengers of the same being there, or to prevent them falling over it ; whereby plaintiff stumbled over the said piece of timber and was thereby thrown down and injured. Pleas, the general issue ; and that defendants did not, either by themselves or servants, erect the scaffold or fix the piece of timber.

At the trial, it appeared that the London and Blackwall Co. entered into a contract with B. to effect the necessary works ; who thereupon made a sub-contract with defendants to construct a tubular bridge, principally of iron, to go across a public highway. Defendants resided at Birmingham, and paid C. a salary to attend to their general business ; C. also entered into a contract with them, for the further sum of 40*l.*, to erect the scaffolding necessary for the bridge, defendants finding the materials, including gas lights. It appeared that C. kept separate books, and himself engaged and paid the men for erecting the scaffolding. In the course of the work, one of the poles rested upon a sleeper, which was above the level of the pavement, and there being only one light placed

And where a sub contractor was employed to erect a scaffold : —Held, that the party who employed him was not liable for injuries received by plaintiff, who fell over a part of the scaffold left by night without lights to give notice of the obstruction.  
*Knight v. Fox.*

(t) 5 Exch. 721 ; 20 L. J., Ex. 9 ; 14 Jur. 963.

## CHAP. IX.—CONSTRUCTION OF RAILWAY.

*negligence in  
constructing  
Works.*

near, the obstruction was not sufficiently visible, and plaintiff fell over it and broke her leg. Additional lights were then put up, and these defendants paid for. On these facts it was objected that defendants were not liable; and plaintiff was non-suited, with leave reserved to move, it being agreed that if there were any mode of putting the case to the jury in which defendants might fairly have been found liable, it should be taken that the jury had so found.

*Purke, B.*—I am of opinion there should be no rule granted in this case. C. was not the servant of the defendants for this purpose; quoad the contract for the scaffolding, he was quite independent. It is the same as if the defendants had contracted with a third person.

*Alderson, B.*—The only question is, whether the negligent act is the act of a servant of the defendants as such servant; If so they are responsible. But it is clear upon the evidence that C. was a sub-contractor, and acting on his own account.

*Pollock, C. B.*—I agree that there ought to be no rule. It struck me strongly at the trial, that if B. were not liable because he had made the sub-contract with the defendants, so they were not to be made liable for the negligence of their sub-contractor. The payment for the additional lights was explained by the terms of the contract, which required the defendants to find the materials; and the lights were considered as part of the materials.—Rule refused.

*liability of  
company for  
fall of brick  
from bridge*

*Kearney v. London, Brighton, and South Coast R. Co. (v).]*—Action for non-repair of a bridge, whereby the plaintiff was injured. At the trial before *Hamm, J.*, it was proved that the plaintiff, while passing along a public highway running under the defendants' railway, was struck by a brick which fell from a perpendicular pier of the bridge. Iron girders rested upon the pier, and the plaintiff was two or three feet from the wall when the brick struck him. The brick was produced in court, and the plaintiff had fitted it into the hole, and had seen several other places from which bricks had fallen out afterwards. Before he was struck, he heard, but did not see, a train pass. The bridge and railway had been used for more than three years. The jury found that there was negligence on the part of the defendants, either in the construction or maintenance, and the Exchequer Chamber were of opinion that there was evidence to support that finding.

*Kelly, C. B.*—We are all agreed that the judgment of the Queen's Bench must be affirmed. . . . It is not necessary to consider whether any duty was imposed upon the defendants by statute; the defendants were under the Common Law liability to keep the bridge in safe condition for the public using the highway to pass under it. The declaration charges that the defendants were guilty of negligence; and there can be no doubt that it was the duty of the defendants who had built this bridge over the highway, to take such care that, where danger can be reasonably avoided, the safety of the public using the highway should be provided for. The question, therefore, is, whether there was any evidence of negligence on the part of the defendants: and by that we all understand such an amount of evidence as to fairly and reasonably support the finding of the jury. The Lord Chief Justice, in his judgment in the court below, said *res ipsa loquitur*, and I cannot do better than refer to that judgment. It appears, without contradiction, that a brick fell out of the pier of the bridge without any assignable cause, except the vibration caused by a passing train. This we think

is not only evidence, but conclusive evidence, that it was loose, for otherwise so slight a vibration could not have struck it out of its place. No doubt it is humanly possible that the percussive of the iron girder arising from expansion and contraction, might have gradually shaken out the mortar and so loosened the brick; but this is merely conjecture. The bridge had been built two or three years, and it was the duty of the defendants from time to time to inspect the bridge and ascertain that the brickwork was in good order and all the bricks well secured. If there were necessity for other evidence, the case is made still stronger by the evidence of the plaintiff, which was uncontradicted on the part of the defendants, that after the accident on fitting the brick to its place several other bricks were found to have fallen out. The judgment of the Queen's Bench must be affirmed.

*Daniel v. Metropolitan R. Co. (c).*—Action by a passenger for negligence of the defendants in carrying him on their line while dangerous works were being executed over it. It appeared from the evidence that works were being executed by the Thames Ironwork Company under a contract with the Corporation of London, the object of which was to make a floor for the London Meat Market. To effect this object, girders of great weight and strength were placed between and on the walls which formed the sides of the railway. These works were executed under an act of Parliament which gave the defendants no control over them. The weight of the girders, and the difficulty of moving them, made the work dangerous; but such work had been performed in different places for years without mischief occurring. There was no signaller to give notice of the approach of trains, nor any arrangement made by which the work might be suspended on the passing of a train. It was believed that the particular girder had gone beyond its balancing line, and had so fallen over. It fell on the passing train and injured the plaintiff. The House of Lords held that these facts were no evidence of negligence.

Non-liability of company for negligence of independent contractors executing work over the line.

Lord *Hatherley* said:—"In a case in which a work is being carried on by competent and intelligent persons accustomed to the business, and in respect to which the evidence is simply this,—that although the work may be considered dangerous, the workmen employed in it have never known an accident before this time, and where the particular accident which has occurred was occasioned by a change from the cautious mode hitherto pursued to a more incautious mode of doing it, to hold the railway company liable for an accident of this description, would, I think, be extending the liability of the company for damages in consequence of supposed negligence in not taking precautions against every remote and contingent possibility of accident, to an extent beyond anything which has been laid down in any case with which I am acquainted, and which indeed common sense would not warrant."

Lords *Chelmsford*, *Westbury* and *Colonsay* concurred. Lord *Colonsay* adding, that if the works had been likely to lead to mischief, it would have been incumbent on the railway company to foresee and to take precautions against it.

(v) L. R., 5 H. L. 45; 40 L. J., C. P. 121; affirming the judgment below, L. R., 3 C. P. 591, which had reversed that of the Common Pleas, L. R., 3 C. P. 216.

Although the plaintiff was a passenger, the principles of the judgment would seem to be of general application, if not a fortiori applicable to other cases.

*Negligence in  
constructing  
Works.*

*to extent of  
company's lia-  
bility when a  
way bridge  
is and injures  
passenger tra-  
velling on the  
way.*

*Grate v. Chester  
& Holyhead  
Co.*

*Grate v. Chester and Holyhead R. Co. (y).]* Action for injuries received by plaintiff by the breaking down of a bridge. Injuries had been received by plaintiff, by the breaking down of a bridge upon defendants' line of railway, during the transit of a passenger train. The services of an eminent engineer had been engaged in the construction of the work. The learned judge told the jury that the question was, whether the bridge was constructed and maintained with sufficient care and skill, and of reasonably proper strength, with regard to the purpose for which it was made; and, that if they should think not, and that the accident was attributable to any such deficiency, plaintiff would be entitled to recover. The counsel for defendants objected, that defendants would not be liable unless they had been guilty of negligence either in constructing or maintaining the bridge. His lordship, however, left the question to the jury, subject to his previous direction, and a verdict was given for plaintiff. Upon motion for a new trial, *Pollock, O. B.*, said—"It does not distinctly appear whether or not the attention of the jury was directed to the proposition, that if a party, in the same situation as that in which the defendants are, employ a person who is fully competent to the work, and the best method is adopted, and the best materials are used, such party is not liable for the accident. If the jury had been directed in conformity with this rule, there is no ground for the present application. It cannot be contended that the defendants are not responsible for the accident, merely on the ground that they have employed a competent person to construct the bridge. Upon this point we will consult our learned brother." On a subsequent day his lordship said—"We have consulted the learned judge, who reports that he directed the jury in conformity with the above proposition, and therefore there will be no rule."

(y) 2 Exch. 251.

## CHAPTER X.

## JURISDICTION OF THE BOARD OF TRADE OVER RAILWAYS.

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1. *General Character of the Jurisdiction of the Board.*

As early as 1839, a Select Committee on Railways, appointed by the House of Commons, expressed a strong opinion that a board would be required to superintend railways, "for the purpose of protecting the weak against the strong, and counteracting the evils incident to monopoly" (a); but the committee did not recommend that the proposed board should interfere with railway legislation.

In 1841, another committee, which was appointed by the Commons, "to consider whether it was desirable for the public safety to vest a discretionary power of issuing regulations, for the prevention of accidents upon railways, in the Board of Trade; and if so, under what conditions and limitations,"—by their report negatived the proposition thus submitted to them, and recommended that the Board of Trade should exercise their supervision over railways, in the way of suggestion, rather than by positive regulations.

The next Select Committee, appointed in 1844, presented six reports to the House of Commons within as many months, and many

1. *General Character of the Jurisdiction.*

*1. General  
Character of  
Jurisdiction.*

of the statutory powers given to the Board of Trade derive their origin from these reports. The committee state that they entered upon their inquiries with a strong prepossession against any general interference by the government in the management and working of railways, and that they had not seen cause to alter their first impressions upon that subject. But with regard to railway legislation, they were convinced that it was alike clear, from reason and from experience, that it should thenceforward be subjected to an habitual and effective supervision on the part of the government. They recommended therefore "that an efficient supervising power should be constituted on the part of the public, to assist the judgment of the Houses of Legislature, and that general principles should be laid down to guide its proceedings;" and that railway bills should for the future be submitted to the Board of Trade, previously to their coming under the notice of Parliament, with regard to certain enumerated subjects.

Parliament subsequently adopted these recommendations; and, by various resolutions embodied in the Standing Orders of both Houses of Parliament, it was required that the Board of Trade should be furnished with certain documents and other information, to enable them to exercise their then intended supervision over projected railway schemes; and during the session of 1845, the Board of Trade reported upon the numerous and very important railway schemes which came before Parliament in the course of that session (*b*).

The experiment thus made did not prove successful (*c*); and, after the reports we have mentioned had been made, it was deemed desirable by the board to make some alterations in the mode of conducting the business of the railway department, which was carried into effect by a minute bearing date the 10th July, 1845.

But the experience of another session of Parliament did not confirm the authority of the Board; and, in 1846, another Select Committee of the House of Commons recommended the appointment of a separate tribunal, which might command the public confidence; and accordingly by 9 & 10 Vict. c. 105, the powers previously vested in the Board of Trade were, with additional powers, transferred to a separate department, called Commissioners of Railways (*d*). This

(*b*) Mr. Lush states, in his evidence given before the Select Committee on Railway Bills (2nd Report), that, for the session 1845, plans and projects were deposited at the Board of Trade by the promoters of 218 distinct projects. Upwards of 700 plans were deposited previously to the session 1846; about 171 previously to the session 1847; about 109 previously to the session 1848; and about 78 previously to the session 1849.

pursued by Lord Dalhousie in 1846, of subjecting each particular scheme to detailed investigation—though universal opinion testifies to the zeal, carefulness and ability of those investigations—failed to ensure the general confirmation of its recommendations by the committees to which they were submitted."—Fifth Report, 1853, p. 14.

(*d*) A curious question arising on the

separate Board continued in existence until 1851, when by 14 & 15 Vict. c. 65, it was also abolished, and the Board of Trade were again entrusted with the powers previously vested in the Commissioners of Railways.

Commissioners of Railways, 1846—1851.

In 1864, the Board had the power conferred upon it of granting certificates for the construction of new railways and for the conferring additional powers upon railway companies already incorporated. In event of no opposition being offered by parties interested, these certificates have the force of special acts (*e*).

Certificates under Acts of 1864.

In 1867, the office of Vice-President of the Board of Trade was abolished, and a "parliamentary secretary" substituted (*f*).

Parliamentary Secretary.

In 1873, certain powers of the Board of Trade over working agreements and the working of steam vessels by railway companies were transferred (for five years) to the Railway Commissioners established by "The Regulation of Railways Act, 1873" (*g*).

Railway Commissioners, 1873—8.

The Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, greatly adds to the duties of the Board in relation to railway companies. Thus the "appointed" commissioners under that act are appointed on the recommendation of the president (s. 3, sub-s. 2), whose concurrence also is required in the rules which the Commissioners may make for their procedure (s. 20), and the Board has power to order the expenses of bridges and other works to be shared between the companies and local authorities (s. 16), and to entertain complaints of unreasonable charges for goods (s. 31), without which complaints having been made, the Commissioners have no jurisdiction to hear applications from the public for through rates (s. 25).

Railway and Canal Traffic Act, 1888.

In addition to these comparatively minor duties, the Board has the completely novel duty, of which it is impossible to exaggerate the importance, of settling the revised classifications and schedules of maximum rates, which it is the duty of every railway company, canal company, and railway and canal company, to submit to the Board under s. 24 of the act. In case of default on the part of a company the Board may prepare classifications of their own.

The new classification of Rates.

The section is dealt with in Ch. XII., sect. 4, *post*. The supreme control is vested, *in theory at any rate*, in Parliament itself.

We will now consider in detail the powers which have been entrusted to, or are now exercised by, the Board of Trade, by the general statute law, without reference to any powers conferred on the Board by any special railway act, such powers having reference only

crossed in a note to the second and subsequent editions of this work. The point raised—that 14 & 15 Vict. c. 64, fails to re-vest in the Board of Trade the powers

ways by 9 & 10 Vict. c. 105,—appears to be untenable, and also out of date.

(*e*) See *post*, sects. 2, 3.

(*f*) 30 & 31 Vict. c. 73.



1. *Character of jurisdiction.*

to the particular railway. Where a railway act provided that certain expenses should be borne by several companies in equitable proportions, to be determined in case of difference by the Board of Trade, it was held by the Lords Justices that the Board were in the position of judges, and not mere arbitrators, and that a bill to set aside their award on grounds applicable to the latter supposition could not be sustained (*h*). It was also said by Lord Justice Turner, that parties bound to abide by the decision of a public board must abide by the course of practice which that board is in the habit of adopting (*i*).

Board of Trade  
may appoint  
arbitrator to act  
for them.

It may also be well to mention in this place, that whenever the Board of Trade are required to make any award or decide any difference in any case in which a company is one of the parties, they may appoint an arbitrator to act for them, and fix his remuneration. They may also refer matters to the Railway Commissioners (*k*).



"The Railway  
Companies  
Powers Act,  
1864."

## 2. *Grant of Certificates under "The Railway Companies Powers Act of 1864," and its Amending Acts of 1868 and 1870.*

& 25 Vict.  
120, s. 3.

By "The Railway Companies Powers Act, 1864," in each of the following cases, namely,—

I. Where a railway company are desirous that authority should be given to themselves and some other company to enter into an agreement with respect to all or any of the matters following, namely,—

working ag-  
ut.

The maintenance and management of the railways of the agreeing companies, or of any part thereof:

The use and working of the railways or railway:

The fixing and apportionment of tolls, rates, and charges:

The joint ownership, maintenance, management and use of a station or other work, or the separate ownership, &c., of several parts of a station or other work.

superfluous  
lands.

II. Where a railway company are desirous of obtaining an extension of the time limited for the sale by them of superfluous lands.

additional  
capital

III. Where a railway company are desirous of obtaining authority to raise additional capital;—

And by "The Regulation of Railways Act, 1868" (*l*), in the following cases:—

variation of  
equities  
arises Act

Where a company desire to make new provisions or to alter any of the provisions of their special act or of "The Companies

(*h*) *Newry and Enniskillen R. Co. v. Ulster R. Co.*, 8 De G., M. & G. 481.  
(*i*) *Ibid*

(*k*) 31 & 32 Vict. c. 119, s. 30 et seq.;  
37 & 38 Vict. c. 40, s. 6, post, vol. II.  
(*l*) 31 & 32 Vict. c. 119, s. 38.

Clauses Consolidation Act, 1845," with respect to all or any of the matters following, namely :—

- (a) General meetings and voting by shareholders :
- (b) The appointment, number and rotation of directors :
- (c) The powers of directors :
- (d) The proceedings and liabilities of directors :
- (e) The appointment and duties of auditors ;—

In any such case the company may apply to the Board of Trade, for a certificate under "The Railway Companies Powers Act, 1864," upon complying with the requisites of that act (*m*).

The principal requisites of the act of 1864 (which was amended as to procedure upon opposition to the certificate by "The Railways Powers and Construction Acts, 1864, Amendment Act, 1870," 33 & 34 Vict. c. 19) are as follows :—

Principal requisites of Act of 1864.

The company must lodge a draft of the certificate as proposed by them at the office of the Board of Trade, and publish notice of the application according to the "general rules" contained in the third part of the schedule to the act (s. 4). These rules may be revised by the Board, subject to the veto of Parliament (s. 35). The rules now (1888) in force provide that notice of application must be published in such local newspapers or gazettes as the case may require, in the months of June or November (rule 3). It is not obligatory on the Board to grant a certificate (s. 24).

Any railway or canal company desirous of opposing the application, may lodge a notice of opposition at the office of the Board of Trade not later than the 1st of August or the 1st of January next succeeding the advertisement of application, according as the same is published in June or November. If notice of opposition be lodged, the Board of Trade may proceed upon the application or not, as they think fit. If the Board proceed upon the application, they settle a provisional certificate, "and, as soon as they conveniently can" after the expiration of seven days from proof of publication of the required notices, procure a bill to be introduced into Parliament for the confirmation of the provisional certificate (Act of 1870, ss. 3, 4).

Opposition to certificate, under amending Act of 1870.

If the certificate be unopposed, a draft certificate as settled by the Board of Trade is to be laid before Parliament, not later in any year than the 1st of June (Act of 1864, s. 12). If neither house resolves to the contrary within six weeks, the certificate is published in the gazettes, and from the time prescribed therein, not being prior to publication, has the operation of a special act (ss. 14—17). The Board may extend, vary or revoke a certificate, and correct errors

How certificate acquires force of special act.

(*m*) The provision of "The Regulation of Railways Act, 1868" (31 & 32 Vict. c. 119, s. 35), that the certificate must first

be submitted to a meeting of proprietors, was repealed by "The Railway Companies Meetings Act, 1869," 32 Vict. c. 6.

1. *See report  
Company  
1864, 1865.*

therein (ss. 28, 29). And they must submit annual reports to Parliament of their proceedings under the act (s. 36). The companies empowered by a certificate must, under a penalty of 20*l.* and a continuing penalty of 5*l.*, keep a copy of it at their head office for public sale: (Sect. 31). The provisions of the act, and likewise of the amending act of 1870 (33 & 34 Vict. c. 19), will be found at length in Vol. II.

*The Construction  
Facilities  
Act, 1864*

### 3. *Grant of Certificates under "The Railways Construction Facilities Act, 1864," and its Amending Act of 1870.*

*Application by  
promoters, with  
consent of land-  
owners, &c.  
sects. 3, 4.*

By "The Railways Construction Facilities Act, 1864" (27 & 28 Vict. c. 121), where all landowners and other parties beneficially interested are consenting to the making of a railway or the execution of a work, the promoters may apply to the Board of Trade for a certificate under that act. Such promoters, and all parties interested, may enter into provisional contracts for the purchase of land, and must then publish notices of their intended application, according to the general rules under the act (which the Board of Trade have, by s. 24, power to alter). They must also deposit maps, plans, sections and books of reference, and an estimate of the expense of the construction of the railway, and lodge a draft of the proposed certificate with the Board of Trade, according to the same rules. It is not obligatory on the Board of Trade to grant a certificate. And any railway or canal company desirous of opposing the application may lodge notice of opposition at the Board of Trade, in which case the proceedings take the same course as that marked out by "The Railways (Powers and Construction) Acts, 1864, Amendment Act, 1870" (33 & 34 Vict. c. 19), in the case of an application for a certificate under the Powers Act, stated above. If the certificate be unopposed, the proceedings take the same course as that marked out by the Powers Act. Before the certificate is issued, the promoters, unless they already possess a railway open for public traffic, must deposit not less than 8 per cent. on the estimated expense of their railway in the Bank (Sect. 34). This deposit is to be repaid to them (1) on completion of the railway within five years or other time prescribed in the certificate; (2) on proof to the Board of Trade within the same time that one-half of the capital of the company is paid up and expended for the purposes of the certificate; (3) on the company giving a bond for payment of the deposit to the Crown in event of neither the railway being opened, nor the proof being given as above (sect. 40); and (4) the deposit will, by order of the Chancery

*Board not bound  
to grant certificate.  
sect. 52.*

*Deposit, and  
repayment of  
deposit  
sects. 34, 40.*

Division of the High Court supplying a *casus omissus*, be repaid to the promoters in event of the scheme proving abortive by reason of the rising of Parliament before the bill confirming a provisional certificate can be passed (n). Seventeen general railway acts, with necessary variations, are applied to the railway authorized by the certificate: (Sect. 51). And the third part of the schedule contains a scale of maximum tolls and charges authorized to be taken: (Sect. 49). This scale is of considerable importance, being the first attempt made by Parliament to reduce railway charges to a general system. The Board of Trade, however, may vary the tolls in the certificate: (Sect. 50). Each certificate is, in practice, accompanied by a schedule of tolls, and it is understood that the schedules vary considerably from one another. See the acts in Vol. II.

Scale of tolls.  
Sect. 49.

#### 4. Authority of the Board of Trade over Railways of illegal Gauge.

4. As to Railways of illegal Gauge.

By the act for regulating the gauge of railways (9 & 10 Vict. c. 57) it is enacted, that, with certain exceptions, four feet eight inches and a half in England, and five feet three inches in Ireland, shall be the future gauge of railways for the conveyance of passengers.

9 & 10 Vict. c. 57.

If any railway is constructed or altered contrary to that act, the company are liable to a penalty of 10*l.* per mile per day, which may be recovered under the provisions of "The Railways Clauses Act, 1845" (o). And, besides that penalty, the railway may be abated by the Board of Trade. Certain railways, now forming part of the Great Western Railway system, are exempted from the operation of the act (p).

Sect. 7.

#### 5. Authority of the Board of Trade to sanction Deviations in executing Engineering Works.

5. As to Deviations in Engineering Works.

By "The Railways Clauses Act, 1845" (sect. 12), the Board of Trade are enabled to sanction deviations in executing engineering works upon railways, in certain specified cases. That act, as we have seen, requires that the railway shall be kept at certain levels, unless the consent of the owners of adjoining property, or of two justices,

R. C. Act, s. 12.

Owners of adjoining lands may appeal to Board of Trade against deviations.

(n) *Re Widnes R. Co., L. R.*, 15 Eq. 108; 42 L. T., Ch. 352.

(o) 8 & 9 Vict. c. 20, s. 140, post, vol. II.

(p) The Royal Commission, 1867, reported that the continued existence of the

double gauge was a national evil; and suggested a loan of public money for the purpose of putting an end to it. Report, p. lxxxvi.

## CHAP. X.—JURISDICTION OF BOARD OF TRADE.

“The  
“Law  
“Rel-  
“to”

can be obtained ; but in all such cases of consent, the company are required to give public notice of the deviations, and the owners of lands prejudicially affected may apply to the Board of Trade, who may decide whether, having regard to the interests of the applicants, the deviation is proper to be made, and may, by certificate, either disallow the deviation, or authorize it.

Trade  
Board  
is by  
“the  
“Act”

Sect. 14 forbids companies from deviating from or altering the engineering works, as described in the parliamentary section, except within certain prescribed limits ; and provides, that gradients may be diminished to any extent, and increased, in the case of an inclination not exceeding one in a hundred, nor more than ten feet per mile, in the case of an inclination exceeding one in a hundred, not more than three feet per mile, but in either case to such further extent as shall be certified by the Board of Trade to be consistent with public safety and not prejudicial to the public interest ; and in like manner the radius of a curve may be diminished, or a tunnel substituted for an open cutting, if such alterations be authorized by a certificate from the Board. And sect. 66, after reciting that expense might frequently be avoided, and public convenience promoted, by a reference to the Board of Trade, upon the construction of public works of an engineering nature connected with the railway, where a strict compliance with that act, or the special act, might be impossible or inconvenient, and without adequate advantage to the public,—enacts, that if any difference in regard to the construction, alteration, or restoration of any road, or bridge, or other public work of an engineering nature, should arise between the company and any trustees, &c., or other persons, either party, after giving notice to the other, may apply to the Board of Trade to decide on the proper manner of constructing, &c., such work. The Board may then, if they think fit, decide the same accordingly, and authorize, by certificate, any arrangement or mode of construction, in regard to such work, which shall appear to them either to be in substantial compliance with the provisions of the Railways Clauses Act and the special act, or to be calculated to afford equal or greater accommodation to the public ; but no such certificate can be granted, unless the Board are satisfied that existing private rights or interests will not be injuriously affected thereby.

“Trade  
“Board  
“is by  
“the  
“Act”

Part I. of the Railways Clauses Act, 1863, also, as we have seen (*q*), gives further authority to the Board of Trade to sanction alterations in engineering works, and deviation from the line of any arch, tunnel, or viaduct.

(*q*) Ante, p. 356. See also “The Railways Construction Facilities Act. 1864,” 27 & 28 Vict. c. 121, vol. II.

6. *Protection of Navigation.*

*6. Protection of  
Navigation.*  
R. C. Act, 1868.

Part I. of the Railways Clauses Act, 1863, also contains various provisions giving authority to the Board of Trade to require certain things to be done for the protection of navigation.

Thus, where a company is authorized by the special act to construct, alter or extend any work on, in, over, through or across tidal lands or a tidal water, the company must (under a penalty of 20*l.* a night), on or near the work during the whole time of construction, &c., exhibit and keep burning, every night, such lights as the Board of Trade requires or approves; and must also, under a similar penalty, maintain similar lights for the guidance of ships on or near the work when it is completed.

*Lights on works.*  
Sect. 18.

And where the company is authorized to construct a bridge over a navigable tidal water, and the special act does not make express provision respecting the spans of the bridge, the company must construct the bridge with spans of such headway and waterway, and with such opening spans (if any), and according to such plan, as the Board of Trade directs or approves. Where the bridge is constructed with an opening span, the company must abide by such regulations, as to the user of the bridge, as may be made by the Board under a penalty not exceeding 20*l.*

*Construction of  
bridges.*  
Sect. 14.

*User of bridges.*  
Sect. 15.

And where the railway cuts off access between the land and a tidal water or tidal lands, the company must, during the construction of the railway and from time to time thereafter, make, maintain, and keep open for public use and free of toll all such footways and carriage-ways over, under or across the railway, or on a level therewith, as the Board of Trade directs or approves (subject to certain provisos). Where the footway or carriage-way is made across the railway on the level, the manner of making and watching the level crossing is subject to the approval of the Board of Trade.

*Access to the  
shore under or  
across the rail-  
way.*  
Sect. 10.

Where a company is authorized to construct a railway skirting a public navigable tidal river or channel, the company must not make any deviation of the railway from the continuous centre line thereof marked on the plan deposited by them at the Board of Trade, even within the limits of deviation shown on that plan, in such manner as to diminish the navigable space, without the previous consent of the Board, or otherwise than in such manner as is expressly authorized by the Board. If any deviation is made in contravention of this section, the Board may abate and remove the work in the construction whereof the deviation is made, and restore the site to its former condition, at the expense of the company. The amount of the expense becomes a debt due to the Crown, and recoverable accordingly, or it

*Deviation of line  
skirting river.*

*Abatement of  
abandoned work  
over tidal lands.*  
Sect. 18.

may be recovered in the same manner as a penalty is recoverable. Similarly, if a work constructed over tidal lands or a tidal water is abandoned or suffered to fall into decay, the Board of Trade may abate the work, and restore the site to its former condition, at the expense of the company.

*Survey of works  
over tidal lands.*  
Sect. 19.

If at any time the Board of Trade deems it expedient, for the purposes either of the special act or of that part (Part I.) of the Railways Clauses Act, 1863, which relates to the construction of a railway, to order a survey of a work constructed by the company over tidal lands or tidal water, or of the intended site of any such work the company must defray the expense of the survey.



*7. In position to  
open up railway.*

#### 7. *Inspection of Passenger Railway before opening.*

*5 & 6 Vict. c. 55.  
First notice.*

No railway, or any portion of a railway, can be opened for the public conveyance of passengers, until one month after notice of the intention of opening it has been given to the Board of Trade by the company, and until ten days after notice has also been given of the time when the railway will be, in the opinion of the company, sufficiently completed for the safe conveyance of passengers, and ready for inspection (*r*). Upon receipt of this latter notice the Board of Trade appoint an engineer officer to inspect the line in question (*s*); and gave notice to that effect to the railway company. This officer may enter upon and examine the railway and works (*t*); and if any person wilfully obstructs him a justice may fine the offender 10*l*. (*u*). If that officer reports that the opening would be attended with danger to the public, the Board of Trade may, from time to time, order the company to postpone the opening, for any period not exceeding one month at a time, until it appears that the opening may take place without danger to the public: but such order is not binding on the company, unless a copy of the report of the officer be delivered to the company with the order (*v*). If any company open a railway without giving the before-mentioned notices (*y*), or in contravention of the order of the Board of Trade (*y*), they are liable to a penalty of 20*l*. for every day during which the railway so continues open.

*Second notice.*

*Postponement of  
opening  
Sect. 6.*

*Opening of  
additional line  
R. R. Act, 1871*

By the Regulation of Railways Act, 1871, the foregoing provisions extend to the opening of any additional line, deviation line, station,

(*r*) 5 & 6 Vict. c. 55, s. 1.  
(*s*) 5 & 6 Vict. c. 55, s. 5; 7 & 8 Vict.  
c. 55, s. 15.  
(*t*) *Ibid*

(*u*) 3 & 4 Vict. c. 97, s. 6.  
(*v*) 5 & 6 Vict. c. 55, s. 6, vol. II.  
(*y*) 5 & 6 Vict. c. 55, s. 5.

junction or level crossing directly connected with a passenger railway; but the Board of Trade may dispense with the required notice so far as regards such works (c). And by the Railway Regulation Act, 1873, where the inspecting officer has reported against the opening, and the Board has postponed the opening once, the Board may direct further monthly postponements without going to the expense of directing further inspections until it appear that the requisitions of the inspecting officer with reference to the safety of the public have been complied with, or the Board be otherwise satisfied that the railway can be opened with safety (d). Although the Board may have sanctioned the opening of one line of railway, they have authority to prohibit the use of an additional line of rails subsequently laid down upon the same railway (b): and the consent of the Board is not by any means dispensed with by the fact that the additional line manifestly conduces to the greater safety of the public. In a case heard after 1871, junctions were made in 1863 between the main line of a railway and two branch lines on opposite sides of the main line, so that trains coming from one of the branch lines ran for some distance along the main line, and then passed on to the other branch line. Some years afterwards the company laid down on their own land a new line parallel to their main line for about a mile, and substituted for one of the original junctions a new junction, so as to form between the two branch lines a level crossing over the main line, and the company also made two new stations on this new line. It was held by James, L. J., that the new line could not be opened without the previous sanction of the Board of Trade (e).

Further monthly postponements, without further inspection.  
R. R. Act, 1873.

It has been held that the Board of Trade has an absolute discretion to postpone the opening of a railway upon the report of their inspector. In *Attorney-General v. Great Western and Midland Railway Companies* (d), the defendant companies had constructed a short passenger branch line (called the Clifton Extension Railway), the opening of which the Board of Trade directed to be postponed upon the report of the inspector (e) that the opening would be dangerous to the public unless a station were erected at the point of junction with the line of the Bristol Port Company (over which the defendant companies had running powers), or an existing station on that line, about a quarter of a mile from the point of junction, were enlarged. The company deeming the order of postponement not to be

Absolute discretion of Board of Trade—requirement of new station.

(c) 34 & 35 Vict. c. 71, s. 5.

(d) 36 & 37 Vict. c. 76, s. 6.

(b) *Attorney-General v. Oxford and Wolverhampton R. Co.*, 2 W. R. 330.

(e) *Attorney-General v. G. W. R. Co.*, L. R., 7 Ch. 787, affirming *Wickens, V.-C.*, ib. 770. note.

192; 35 L. T. 302, 921; 25 W. R. 330, 1015—C. L.

(\*) The concluding words of this report were, "that the opening . . . cannot be sanctioned without danger to the public using the same, by reason of the incompleteness of the works."



7. *In part of the power of the Board of Trade.*

within the powers of 5 & 6 Vict. c. 55, s. 6, gave notice to the Board that they would disobey the order unless an injunction were obtained to restrain them from opening. Jessel, M. R., granted such an injunction, being of opinion that the only statutory preliminary of an inspector's report as to "incompleteness of the works"—which term would include the want of a station—having been complied with, he had no jurisdiction to inquire into the reasonableness, either of the inspector's report, or of the action of the Board of Trade thereon, and this decision was affirmed by the Court of Appeal.

For Circulars, &c., of the Board of Trade under the above Acts, see Vol. II.

8. *Superintendence of Works of Railway after opening.*

Two companies having common terminus or rails.

5 & 6 Vict. c. 55, s. 11.

### 8. *Superintendence of Works of Railway after opening.*

As to the superintendence of railways when constructed, if the railways of two or more companies have a common terminus, or a portion of the same line of rails in common, or form separate portions of one continued line of communication, and cannot agree upon arrangements for conducting their joint traffic with safety to the public, the Board of Trade may, upon the application of either of the parties, decide the questions in dispute, so far as relate to the safety of the public, and may also determine by whom the expenses attending on the arrangements shall be borne. So, where railway companies are bound by their special acts to make, at the expense of adjoining owners, openings in their lines for effecting communications with branch railways, and any difference arises between the company and the owners as to the proper places for making such communications, the Board of Trade may determine the difference in a manner binding on all parties (*f*). A clause in a subsequent statute (which is only applicable to passenger railways (*g*)),—after reciting that powers of laying down branch lines opening into main lines and of passing along the main lines, and also powers to form roads or railways across existing railways on a level, had been given by various special acts to adjoining owners—enacts, that if it appear to the Board of Trade that such powers cannot be so exercised, without seriously endangering the public safety, and that an arrangement may be made, with a due regard to existing rights of property, the Board may order that

Junctions.

7 & 8 Vict. c. 7, ss. 15, 16.

Branch lines.

5 & 6 Vict. c. 55, s. 12.

(*f*) The jurisdiction in this matter, given by special acts of early date to justices of the peace, is taken away by sect 19. See also 26 & 27 Vict. c. 92, s. 9, which authorizes the Board of Trade to appoint a referee in disputes about junctions.

(*g*) No railway is considered a passenger railway within this clause, if two-thirds of its gross annual revenue is derived from the carriage of coals, iron, stone or other metals or minerals. See 5 & 6 Vict. c. 55, s. 12.

such power shall only be exercised subject to such conditions as they shall direct.

In all cases where railways cross roads on the level, and the company are willing at their own expense to carry the road over or under their railway by a bridge, the Board of Trade are empowered, *on the application of the company*, and after hearing the parties interested, if it shall appear that the level crossing endangers the public safety, and that the proposal of the company does not violate existing rights or interests without adequate compensation, to give the company authority to build a bridge, or make such other arrangements as the nature of the case shall require.

Level crossings  
Sect. 1

Where the company is authorized by a special act passed after the Railway Clauses Act, 1863, and incorporating the first part of that act, to carry the railway across a turnpike road or public carriage road on a level, it is provided by s. 6 of the Railway Clauses Act, 1863, "for the greater convenience and security of the public," that the company shall erect a lodge and keep a proper person to watch at the crossing, and shall be subject to such regulations with regard to the crossing, or the speed at which trains may pass, as may from time to time be made by the Board of Trade, under heavy penalties (26 & 27 Vict. c. 92, s. 6). The Board of Trade may also at any time, if it appears to them necessary for the public safety, *require* a bridge to be substituted for a level crossing, and power is given to the company to take additional land for that purpose: (Sects. 7, 8.)

R. C. Act, 1863,  
s. 6.  
Lodge at point  
of crossing.

Board of Trade  
may require a  
bridge instead.

And where a railway cuts off access between the land and a tidal water or tidal lands, the company are bound to make and maintain, free of toll to all persons at all times, such foot-ways, and carriage-ways under, over or across the railways, or on a level therewith, as the Board of Trade directs or approves: (Sect. 16.)

Access to shore  
under or across  
the railway.

The control of certain gates placed upon railways is also entrusted to the Board of Trade. Before 5 & 6 Vict. c. 55, railway companies were, in some cases, compelled, by their special acts, to keep gates at level crossings closed across their railways; but that statute directs, that, in all such cases, the gates are to be kept closed across the road, in lieu of across the railway; but it is provided, that the Board of Trade may, in special cases, order that they should be kept closed across the railway, instead of across the road. And by sect. 47 of the Railways Clauses Act, 1845, similar powers, with regard to all gates across such roads, are given to the Board of Trade. And, by the same act, trains may not cross a turnpike road on a level, adjoining any station, at a greater speed than 4 miles an hour; and the company are made subject to all such regulations as to such crossings as may be made by the Board of Trade (8 & 9 Vict. c. 20, s. 48). So, the Board may require the company to make a screen, or other

Gates.

5 & 6 Vict. c.  
55, s. 6.

R. C. Act, s. 47.  
Special.  
Sect. 48.

Screens.

8 *Superintend-  
ence of Work,  
after opening.*

Entry on adjoining  
lands, to  
repair accidents,  
&c.

3 & 4 Vict. c.  
55, s. 14.

works, on the side of roads adjoining a railway, to prevent horses from being frightened : (Sects. 63, 64.)

The Board of Trade are also enabled, in certain specified cases, to authorize companies to take possession of lands adjoining to railways.

Thus, the Board may empower a company, in case of an accident or slip happening, or being apprehended, to any cutting, embankment, or other work, to enter upon lands adjoining the railway, to repair or prevent the accident, and to do any necessary works. In cases of necessity, the company may enter and execute the works, without previous sanction, the company taking care, within 48 hours after such an entry, to report to the Board the nature of the accident, and the works necessary. But these powers cease, if the Board, after considering the report, certify that they are not necessary for the public safety; and no land may be taken permanently for such works, without a certificate from the Board of Trade.

Revival of com-  
pulsory powers  
in respect of  
additional land,  
Sect. 13.

So, in cases where the compulsory powers of purchasing and taking lands have expired, if the Board of Trade certify that the public safety requires additional land to be taken, "for the purpose of giving increased width to the embankments, and inclination to the slopes of railways, or for making approaches to bridges or archways, or for doing such works for the repair or prevention of accidents as are hereinbefore described," the compulsory powers of taking land, which may be contained in the act of the company, revive, so far as regards the portions of land mentioned in the certificate.

Railway  
carriages.

It may be added here, that the Board of Trade have power under the Regulation of Railways Act, 1868, s. 20, to exempt railway companies from the obligation to provide smoking carriages; and that by sect. 22 of the same act, it is for the Board of Trade to approve the means of communication between passengers and the servants of the companies which are required to be provided under that section.

9 *Regulation*

#### 9. *Authority of the Board of Trade to sanction Bye-laws.*

The jurisdiction of the Board of Trade over bye-laws depends chiefly upon certain enactments contained in 3 & 4 Vict. c. 97, which, after reciting that companies were or might be authorized to make bye-laws, and impose penalties "upon persons other than servants of the company," and after providing for bye-laws made before the passing of that act (A.D. 1840), enacts as to future bye-laws, that

no "such" bye-law, order, rule or regulation annulling any existing bye-law, shall have any force, until two months after a copy of such bye-law shall have been laid before the Board, unless the Board shall before such period signify their approbation thereof.

The Board are also authorized, at any time either before or after any bye-law, &c. laid before them shall have come into operation, to notify to the company their disallowance thereof, and, in certain cases, the time at which it shall cease to be in force; and no bye-law, &c. so disallowed has any force (3 & 4 Vict. c. 97, s. 9) (*h*). It was afterwards provided by the Companies Clauses Act, 1845, 8 & 9 Vict. c. 16, ss. 124, 125, that companies might make bye-laws "for regulating the conduct of the servants of the company," and impose reasonable penalties for the breach of them; and by the Railways Clauses Act, 1845, 8 & 9 Vict. c. 20, ss. 108, 109, that companies might, "subject to the provisions of" 3 & 4 Vict. c. 97, make bye-laws "for better enforcing the observance of all regulations made (inter alia) generally for regulating the travelling upon or using and working the railway."

Disallowance of  
bye-laws.  
3 & 4 Vict. c.  
97, s. 9.

It may be collected from the foregoing enactments (although they are not very clearly expressed), that the power to make bye-laws, upon persons other than officers and servants, is still in theory preserved to railway companies, as it existed before the statute, subject to the control of the Board of Trade. But it seems that the Board of Trade have no jurisdiction over bye-laws regulating the conduct of the servants of the company. The words of the 108th and 109th sections of the Railway Clauses Act are no doubt wide, and grammatically include the servants of the company; but the 109th section must be taken to incorporate the 8th section of 3 & 4 Vict. c. 97, and that latter section by the use of the word "such" must be taken expressly to exclude the servants of the company from its general operation. The Companies Clauses Act does not seem to affect the legal point. By sect. 124, bye-laws as to servants are not to be repugnant to the provisions of the "special act," and as the Railways Clauses Act must be taken to be part of each special railway act, it is the Railways Clauses Act, not the Companies Clauses Act, which governs the question. And since the Railways Clauses Act leaves bye-laws as to servants unaffected, the companies may make such bye-laws under either act, as they think proper.

Bye-laws as to  
servants.

The Board of Trade have framed three model codes of bye-laws for English, Scotch and Irish railways respectively, to which all the companies have assented. The three codes are very nearly alike,

Bye-laws for  
regulating  
travelling.

(*h*) Some special acts of early date contained provisions requiring the approval of bye-laws by justices, but these provisions are repealed by 3 & 4 Vict. c. 97, s. 10.

9. Bye-laws.

the only important difference being that the Irish code contains a bye-law against gambling which is not to be found either in the English or Scotch code. Companies coming into existence after the model codes were formed, may frame bye-laws of their own; but as they have no force unless sanctioned by the Board of Trade, that Board has practically the power of compelling these companies also to adopt the model codes. The English code is set out at length in a subsequent chapter (i).

Explosives.

The Board of Trade also sanctions bye-laws regulating the carriage of gunpowder and other explosive substances, under the Explosives Act, 1875, 38 Vict. c. 17, s. 32 (k).

10. As to Prosecutions and Legal Proceedings.*10. Authority of the Board of Trade to originate Prosecutions, and other Legal Proceedings.*

The Board of Trade were authorized by a statute passed in 1840 (l) to take certain steps to compel railway companies to comply with the provisions contained in their special acts of Parliament; but that statute was superseded in 1844 by a more extensive measure.

If railway companies contravene statute, Board of Trade to certify the same to the Attorney-General, who shall proceed against them. 7 & 8 Vict. c. 56, s. 17.

Whenever it appears to the Board of Trade that any of the provisions of the special acts, or of any general act relating to railways, have not been complied with by a company, or its officers, or that a company has acted or is acting in a manner unauthorized by statute relating to the railway, or in excess of the powers of such acts, and it also appears to the Board that it would be for the public advantage that the company shall be restrained from so acting, the Board "shall certify the same" to the Attorney-General; and thereupon the Attorney-General "shall," in case the default consist of non-compliance with the acts, proceed to recover penalties or forfeitures, or otherwise to enforce the due performance of the acts. In case the default consist in the commission of some act unauthorized by law, the proceeding must be to obtain an injunction to restrain the company from acting in such illegal manner, or to give such other relief as the nature of the case may require. But it is provided, first, that no certificate be given until 21 days after the Board has given notice to the company of their intention to give it; secondly, that no legal proceedings be commenced, except upon certificate, and within one year after offence committed.

21 days' notice to company. Sect. 19. Limitation.

(i) See post. Chap. XII., Sect. 16. "Regulations as to Bye-laws." It must be borne in mind that in theory it is the companies, and not the Board of Trade, who have the

power of making bye-laws.

(k) See Chap. XVI., Sect. 5, post.

(l) By 3 & 4 Vict. c. 97, s. 11.

The Attorney-General is bound to act on receiving the certificate of the Board of Trade (*m*), and the Court will not inquire into the reasons for which the certificate was given (*n*).

The Board of Trade may also, upon a certificate of the Board alleging a violation of sect. 2 of the Railway and Canal Traffic Act, 1854 (*o*)—or, of sect. 16 of the Regulation of Railways Act, 1868 (*p*),—or, of any part of the Regulation of Railways Act, 1873 (*q*), appoint “any person,” whether personally aggrieved or not, to apply to the Railway and Canal Traffic Commission for redress (*r*). Chambers of Agriculture, and similar associations, have no *locus standi* before the Railway and Canal Traffic Commission, without previously obtaining a certificate from the Board that they are in the opinion of the Board proper bodies to complain (*s*). No member of the public may apply for a through rate without having previously complained to and obtained a hearing from the Board (*t*); and the Board has a general, but rather vague power, of entertaining complaints by any person, or by any borough council, or similarly representative body, that a railway company is charging him an unfair or unreasonable rate of charge, or is in any other respect treating him in an oppressive or unreasonable manner, whereupon the Board, if they think there is reasonable ground for the complaint, may call upon the company for an explanation, and endeavour to settle amicably the differences which have arisen (*u*).

Application to  
Railway and  
Canal Traffic  
Commission.

R. R. Act, 1873.

A particular power, given by the 3rd section of the Railway and Canal Traffic Act, 1854, of procuring the Attorney-General to take proceedings under that act, although not extinguished, would seem to be rendered unnecessary by the Regulation of Railways Act, 1873.

# 11. Returns as to Tolls, Accounts and Traffic, Accidents, Signal Arrangements, and Continuous Brakes.

## 11. Returns.

By an act passed in 1840 (*x*), the Board of Trade may direct every railway company to deliver a table of all tolls, rates and charges,

Returns of tolls.

(*m*) *Attorney-General v. Great Northern R. Co.*, 29 L. J., Ch. 794.

(*n*) *Attorney-General v. Oxford and Wolverhampton R. Co.*, 2 W. R. 330.

(*o*) 17 & 18 Vict. c. 31, vol. II. The 2nd section prescribes the giving due facilities for traffic and forbids undue preference.

(*p*) 31 & 32 Vict. c. 119, vol. II. The 16th section, par. 2 of which is repealed by the Act of 1888, but partially repeated (see p. 627, post) by s. 28 of that Act, forbids undue preference in cases where railway companies work steam vessels.

(*q*) 36 & 37 Vict. c. 48, vol. II. See

especially sects. 11, 14, 17, 18 and 20.

(*r*) Regulation of Railways Act, 1873, 36 & 37 Vict. c. 48, s. 6; Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, s. 1.

(*s*) Act of 1888, s. 7, sub-s. (b). Under the Act of 1873, s. 13, a preliminary certificate of the Board was required in the case of applications by any public bodies, *e.g.*, even by municipal corporations, but that section is repealed.

(*t*) Act of 1888, s. 25, 31.

(*u*) Act of 1888, s. 31.

(*x*) 3 & 4 Vict. c. 97, s. 3, vol. II.

11. Returns.

from time to time levied on each class of passengers, and on cattle and goods conveyed by the railway (*x*); such returns to be required, in like manner, from all the companies, unless the Board specially exempt any of them. But these returns have never been required by the Board of Trade, so that no public department is in possession of general information as to the amounts of *actual* tolls, rates, and charges, and the differences between maximum and actual tolls, &c. Such differences for any time being are ascertainable only by a comparison of the tables published by the companies under the provisions of two recent statutes (*y*), with the clauses of the special act affecting that part of the line on which they are charged. A return of *maximum* rates and charges for passengers, animals, and goods, which the railway companies of the United Kingdom are authorized to make, was presented to the House of Commons in 1881.

Cotton statistics.

By 31 & 32 Vict. c. 33, railway companies are required to furnish to the Board of Trade monthly returns as to the amount of cotton forwarded by them.

Accounts.  
Acts of 1868,  
1871, and 1888.

By the Regulation of Railways Act, 1868, s. 4, every railway company must forward to the Board of Trade a copy of its half-yearly statement of accounts. And by the Regulation of Railways Act, 1871, s. 9, every railway company must forward to the Board annual returns of their capital, traffic and working expenditure. In each case the Board may alter, with the consent of a company, the comprehensive forms set forth in the schedules to the respective statutes (*z*); and the Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, enacts, by s. 32, that the returns under s. 9 of the Act of 1871, shall "include such statements as the Board of Trade may from time to time prescribe," altering the forms referred to in that section "in such manner as they think expedient."

Returns of accidents.  
R. R. Act, 1871.

Returns of accidents, which had been previously required by the act of 1840, and a subsequent act of 1842 (5 & 6 Vict. c. 56) amending it, are now entirely governed by the Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78). That statute (sect. 6) prescribes that the railway companies concerned must furnish to the Board of Trade notice of any of the following accidents:—

- (1) Any accident attended with loss of life or personal injury :
- (2) Any collision with a passenger train :
- (3) Any passenger train, or part of it, leaving the rails :
- (4) Generally, any accident likely to cause loss of life or personal injury, "and which may be specified in that behalf by any

(*x*) 3 & 4 Vict. c. 97, s. 3, vol. II.

(*y*) See as to rates for passengers, 31 & 32 Vict. c. 119, s. 15; and as to rates for

goods, 36 & 37 Vict. c. 18, s. 14, vol. II.

(*z*) See Chap. II., Sect. 11, ante.

order to be made from time to time by the Board of Trade."

The notice is to be sent by the earliest practicable post, and the Board may direct notice of any class of accidents to be sent by telegraph. The penalty for non-compliance with the 6th section is not more than 20*l.*, and is, by the 15th section, recoverable in the same manner as penalties imposed by the Railways Clauses Act, 1845, s. 145, *i.e.*, before two justices of the peace or a stipendiary magistrate.

Every railway company must, on or before the 15th of February in every year, make a return to the Board of Trade of the number of cases in which any passenger line is crossed on the level by any other passenger or goods line or siding; of the number of cases in which the requirements of the inspecting officers have or have not been complied with in respect of signal arrangements; of the number of miles of railway worked on the absolute or permissible block system respectively; the train porter system; and the train staff system; with various other particulars minutely detailed in the schedules to the Railway Regulation Act (Return of Signal Arrangements, 1873), 36 & 37 Vict. c. 76, and required by the 4th section of that act.

Returns of signal  
arrangements.  
R. R. Act, 1873.

Every railway company must also make to the Board of Trade returns respecting the use of continuous brakes on the passenger trains running on the railways worked by such company, and containing the name and description of brake in use, the amount of stock fitted with continuous brakes, the amount of stock not so fitted, with other particulars contained in the schedule to the Continuous Brakes Act, 1878, "and such other particulars as the Board of Trade from time to time prescribe."

Returns as to  
Continuous  
Brakes.

For the statutes and orders of the Board of Trade thereunder, see vol. II.

## 12. Regulation of Third-Class Trains.

## 12. Third-Class Trains.

Railway companies were required by 7 & 8 Vict. c. 85, s. 6, to convey passengers by third-class trains, on payment of specified fares; and over certain conditions as to speed, and other particulars, the Board of Trade had a special controlling power. But this enactment has been repealed and replaced by the Cheap Trains Act, 1883, under which the Board of Trade, and under certain circumstances the Railway Commissioners have a more general power to require a proper proportion of accommodation for passengers at not more than penny per mile fares, which power is dealt with elsewhere (*u*).

(*u*) See on this subject, post. Chap. XII., Sects. 12, 14.



13. *Speed of Mail Trains.*13. *Regulation of Speed of Mail Trains.*

The obligations imposed on railway companies to transmit her Majesty's mails are treated of elsewhere (*b*). An early statute required them to convey the mails by trains propelled at any speed which the Postmaster-General might require, not exceeding the maximum speed of their first-class trains (*c*), but, by a subsequent statute, the Postmaster-General is authorized to require that the mails shall be forwarded, by certain railways, at any rate of speed which the Inspector-General of Railways may certify to be safe, not exceeding 27 miles in the hour, including stoppages (*d*).

14. *Arbitrators, Umpires, and Inspectors.*14. *Authority of the Board of Trade to appoint Arbitrators, Umpires and Inspectors.*

By "The Railway Companies Arbitration Act, 1859" (*e*), the Board of Trade may in certain cases appoint arbitrators and umpires. The Board of Trade are also authorized to appoint an umpire to determine certain matters referred to arbitration, under the provisions of the Consolidation Acts (*f*). This power applies to all cases where a railway company is one of the parties interested in the application; and the Board may be called upon to exercise their powers, if the arbitrators refuse or neglect for seven days to appoint an umpire. See the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 131; the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, s. 28 (*g*); the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 129; the Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, ss. 30—32; and the Board of Trade Arbitrations Act, 1874, 37 & 38 Vict. c. 40.

Power to appoint arbitrators to determine compensation to labouring classes.

Many special acts (*h*), relating to railways in the neighbourhood of London, require the companies to provide cheap trains for the labouring classes, and limit the liability of the companies in respect of accidents happening to passengers by such trains to 100*l.*; the amount of compensation payable in respect of any passenger so injured to be determined by an arbitrator to be appointed by the Board of Trade, and not otherwise. And it is provided generally by

(*b*) See Chap. XII., Sect. 10.

(*c*) 1 & 2 Vict. c. 98, s. 1, post, vol. II. (Still unrepealed.)

(*d*) 7 & 8 Vict. c. 85, s. 11.

(*e*) 22 & 23 Vict. c. 59, ss. 8, 10, 13, 15.

(*f*) See *Newry and Enniskillen R. Co.*

v. *Ulster R. Co.*, 8 De Gex, M. & G. 487.

(*g*) See Chap. VI., Sect. 3, ante, and 11 & 15 Vict. c. 61, s. 3, post, vol. II.

(*h*) See Chap. XII., Sect. 12, post.

the Regulation of Railways Act, 1868, s. 25, that where a person has been injured or killed by an accident, the Board of Trade, upon the joint application of the company and the party claiming compensation, may, if they think fit, appoint an arbitrator to determine the amount of compensation, if any, to be paid.

The same act (sect. 6) gives power to the Board to appoint inspectors to examine into the affairs of a railway company and the condition of its undertaking, upon application made by directors or a certain proportion of shareholders.

15. *Authority of the Board of Trade to authorize the Abandonment of Railways.* 15. Abandonment of Railways.

If any company, authorized by act of Parliament passed before 1867 to make a railway, desire that the making and carrying on of such railway, whether commenced or not, be abandoned, such company may, with the consent of the holders of three-fifths of the shares of the company (*i*), make application to the Board of Trade, setting forth the particulars of the railway or portion of the railway desired to be abandoned, and the grounds of the application (*k*). After providing for the mode of calling a meeting of shareholders to obtain their consent to the abandonment, and of calling a second meeting, if the Board of Trade think it necessary, the act provides, that if it appear to the Board that there are sufficient grounds for entertaining such application, the Board "shall require" the company to give notice of such application by advertisement, setting forth therein how any person, who thinks himself aggrieved by the proposed abandonment, may bring such objection before the Board of Trade. The Board may inspect the books of account, &c., and also may send an officer to inspect the railway or work proposed to be abandoned.

Upon proof that such notice had been duly given, the Board may, by warrant, authorize the abandonment of the railway or portion of railway: but they are not bound to do so (*l*). And it is expressly provided that in considering the objections to the proposed abandonment of a part only of the railway, the Board shall have regard to

(*i*) As to abandonment where less than three-fifths of the share capital has been subscribed, see the Railway Companies Act, 1867, 30 & 31 Vict. c. 127, s. 32, vol. II.

(*k*) Abandonment of Railways Act, 1850, 13 & 14 Vict. c. 83, extended by the Railway Companies Act, 1867, 30 & 31 Vict. c. 127, s. 31, to railways authorized

by acts passed before 1867, and amended in some details by that act, sects. 31—35, and by the Abandonment of Railways Act, 1869, 32 & 33 Vict. c. 114, vol. II. The Commissioners of Railways were originally authorized to grant the warrant, but were on their abolition superseded by the Board of Trade by 11 & 15 Vict. c. 64.

(*l*) 30 & 31 Vict. c. 127, s. 31 (*3*), vol. II.

15. Abandonment of Railways.

Sect. 17.  
Claim for compensation.

the local situation of the lands of the shareholders objecting, and may in certain cases reduce or cancel the shares of the shareholders so objecting: (Sects. 15, 16.)

Within one month after any warrant is granted, the company must give notice, requiring all persons having any claims upon the company for compensation or otherwise to transmit the statement of such claims.

Upon proof that notice of the warrant has been duly published, the Board "shall certify" the same accordingly; and such certificate is made evidence.

Release of company from liability to make railway.  
Sect. 19.

After the granting of the warrant the company are released from all liability to make (*m*) or work (*n*) the railway, &c., or to purchase any of the lands, or to complete the purchase of any such lands, or to complete any contract which by reason of such abandonment cannot be performed: (Sect. 19.) But it is provided that the company shall not be released from certain specified contracts; and compensation must also be paid to certain parties as in the act is directed: (Sects. 20—27.)

Abandonment of railway open for traffic.

The terms of the 19th section plainly authorize the abandonment of a railway even after it has been opened for traffic; but it is believed that no instance of this has occurred in practice. Schemes which fail after an opening of the line are either handed over to more prosperous companies under a special act, or worked upon the terms of a composition with creditors under the Railway Companies Act, 1867 (*o*), or special "Arrangement Acts."

16. Light Railways.

Order for construction and working of railway as a light railway.

R. R. Act, 1890, s. 27.

Conditions and regulations for light railways.

*16. Authority of the Board of Trade to authorize Light Railways.*

Under the Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 27, the Board of Trade may by licence authorize a company applying for it to construct and work as a light railway the whole or any part of a railway which the company has power to construct or work. But before granting the licence the Board will cause due notice of the application to be given, and will consider all objections and representations received by them, and make such inquiry as they think necessary. And a light railway must be constructed and worked subject to such conditions and regulations as the Board may impose. It is provided, by sect. 28, that the regulations respecting the weight

(*m*) It was not till three years after the passing of the act that it was decided by *R. v. York and North Midland R. Co.*, 1 E. & B. 858, and p. 371, ante, that the

liability to make the railway does not exist.

(*n*) See Chap. XVI., Sect. 1, post.

(*o*) See Chap. XV., post.

of locomotives, carriages, &c. to be used on the railway shall not authorize a greater weight than 8 tons to be brought upon the rails by any one pair of wheels; and that the regulations respecting the speed of trains shall not authorize speed exceeding 25 miles an hour, <sup>Speed.</sup> and heavy penalties are attached, by sect. 29, to breaches of the regulations. The regulations of the Board must be published by the company like bye-laws under the Railways Clauses Act, 8 & 9 Vict. c. 20, s. 110, and a penalty is affixed to non-publication.

17. *Notices, &c., how to be served and signed.*

17. *Form and Service of Notices.*

The old statutes contained provisions which are referred to in the note (p), directing the mode in which documents issuing from the Board of Trade were to be signed; and also what should be deemed sufficient service of them upon railway companies. But these provisions were all repealed by the Regulation of Railways Act, 1868 (q), which enacts (sect. 39), that—

“All requisitions, orders, regulations, appointments, certificates, licences, notices and documents which relate to a company, if purporting to be signed by some secretary or assistant secretary of or by some officer appointed for the purpose by the Board of Trade, shall, until the contrary is proved, be deemed to have been so signed, and to have been given or made by the Board of Trade. They may be served by the Board of Trade on any company in the manner in which notices may be served under the Companies Clauses Consolidation Act, 1845; and all notices, returns and other documents required to be made, delivered or sent by a company to the Board of Trade shall be left at the office of, or transmitted through the post addressed to, the Board of Trade.”

Service of requisitions, &c.  
R. R. Act, 1868,  
s. 39.

The reference is to the 135th section of the Companies Clauses Act, by which notices may be served by “being left or transmitted through the post directed to the principal office of the company, or one of their principal offices if there shall be more than one, or being given previously to the secretary, or in case there be no secretary, then by being given to any one director of the company.”

And by 14 & 15 Vict. c. 64, where by any act relating to railways or to any railway, the Board of Trade are empowered to make or issue any appointment, authority, determination, order, requisition, regulation, certificate or notice, or to do any other act, the Board of Trade may signify such appointment, &c., or other act by a written or printed document, signed by one of the joint secretaries of the Board, or by some assistant secretary, or other officer appointed by them to sign documents relating to railways. Every such appoint-

14 & 15 Vict. c.  
64, s. 3.

(p) 3 & 4 Vict. c. 97, s. 20; 5 & 6 Vict. c. 55, s. 19, and 7 & 8 Vict. c. 85, s. 23.

(q) 31 & 32 Vict. c. 110, s. 47, post, vol. II.

17. *Form and  
Style of  
Notices.*

ment, &c., signified by a document, purporting to be so signed as aforesaid, is to be deemed authentic, and received in evidence in all Courts without further proof, until it be shown that the document was not signed by the authority of the Board of Trade (r).

Railway and  
Canal Traffic  
Act, 1868.

Finally the Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, prescribes in general terms, as to the validity of documents, that—

Validity of  
documents.

(1.) All documents purporting to be rules, orders, or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders, rules or certificates without further proof, unless the contrary is shown.

(2.) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be conclusive evidence of the fact so certified.

Protection for  
Board of Trade  
in case of crime.

By the Railway Companies Act, 1867, 30 & 31 Vict. c. 127, s. 35, it is provided, that the issuing of any warrant or certificate relating to deposit, or to any money, stocks, &c. deposited, or any error in any such warrant or certificate, shall not make the Board of Trade, or the person signing the warrant or certificate on their behalf, in any manner liable.

(r) See also R. C. Act, 1845, s. 67.

## CHAPTER XI.

## JURISDICTION OF THE RAILWAY AND CANAL COMMISSION.

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1. *Origin of the Jurisdiction.*1. *Origin of  
Jurisdiction.*

THE numerous amalgamation Bills which came before Parliament in the Session of 1872, led to the appointment of a Joint Select Committee of the two Houses, "to inquire into the subject of the Amalgamation of Railways, with special reference to the bills then before Parliament, and to consider whether any and what regulations should be imposed by Parliament in the event of such amalgamations being sanctioned." From the Report of that Committee presented in the same year, it appears that the necessity of the establishment of a special tribunal to deal with certain railway questions was universally acknowledged. The Railway and Canal Act of 1854, the object of which was to compel railway companies to give reasonable facilities to the public, to treat all their customers alike, and to forward through traffic without delay (a), had been administered by the Court of Common Pleas with indifferent success. Indeed, with respect both to main and through traffic, considered irrespective of "undue preference," this act had been a complete failure, not a single successful application having been made. And although "the decisions of the Courts between different classes of traders had been satisfactory in principle, and there was no reason to suppose that

(a) See Chap. XII., Sect. 8, p. 482, post.

*1. Origin of  
Jurisdiction.*

any tribunal specially constituted would come to sounder conclusions," it appeared that questions of fairness of charges were matters of administrative policy rather than simple questions of law, and could be better and more cheaply investigated by a special tribunal acquainted with the subject (b). The committee, therefore, after pointing out that the Board of Trade is not sufficiently judicial, a court of law not sufficiently informed, and a parliamentary committee not sufficiently permanent, recommended the appointment of a Commission, to consist of not less than three persons of high standing, of whom one should be an eminent lawyer, and one a person well acquainted with railway management.

The chairman of this committee, Mr. Chichester Fortescue, now Lord Carlingford, was also President of the Board of Trade. In the Session of 1873 he introduced a bill which followed the recommendations of the committee almost verbatim (c), and which, after some modifications by Parliament, became the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48).

*2. The Railway  
Commissioners.*

*2. The Railway Commissioners.*

Under this Act of 1873, which remained in force for five years after the 21st July, 1873, and till the end of the then next Session of Parliament (sect. 37), and which was afterwards annually continued until the end of 1887, by successive "Expiring Laws Continuance Acts," the Crown appointed three "Railway Commissioners," one "of experience in the law," and one "of experience in railway business," prohibited from holding railway stock of any kind: (Sect. 5) (d). They might, in the exercise of their jurisdiction, call in assessors of "engineering or other technical knowledge" (sect. 23), and enter or depute other persons to enter railway or canal buildings: (Sect. 25.)

(b) See Report, pp. xiii. xlvii.

(c) The Report concludes as follows:—"If the above recommendations are adopted by Parliament they will not have the effect of preventing the railway monopoly or of securing that the public shall share by reduction of rates and fares in any increased profits, which the railway companies may take. But the committee believe that their effect will be—(a) To preserve the competition which now exists by sea; (b) To give immediately such support as is practicable to competition by canal, and both immediately and ultimately to develop and utilize the capacities of canals; (c) To let the public know what they are charged, and why they are charged.

and to give them better means than at present exist for getting unfair charges remedied; (d) To enforce the harmonious working and development of the present railway and canal systems, so as to produce from them, in the interest of the public, at the same time of the shareholders, the greatest amount of profitable work which they are capable of doing."

(d) The Commissioners at the end of 1888 were: The Right Honourable Sir F. Peel, K.C.M.G., A. E. Miller, Esq., Q.C. (appointed in place of H. Macnamara, Esq., barrister-at-law, who died in 1877), and W. P. Price, Esq., formerly chairman of the Midland Railway Company.

Their main business consisted in the enforcement of the 2nd section of the Railway and Canal Traffic Act, 1854, as amended by the act of 1873, with regard to traffic facilities, undue preference, and through rates (see sect. 4 of this chapter); but they were also entrusted with the supervision of working agreements, with the settlement of disputes as to terminal charges, and other matters.

The Commissioners were bound to state a case for the opinion of a superior Court upon matters arising out of sect. 2 of the Act of 1854, and empowered to state a case upon other matters, upon any question which in their opinion was a question of law (sect. 26); but there was no further appeal against the decision of the High Court upon a case so stated (e).

Appeal from the  
Railway  
Commissioners.

The Act of 1873 did not contain, as the Act of 1888 does, any exclusion of prohibition, and the Commissioners were not unfrequently prohibited from dealing with matters beyond their jurisdiction (f).

Prohibitions of  
the Railway  
Commissioners.

Their sittings were "at such times and places as seemed to them most convenient for the despatch of business:" (Sect. 27.) The office of the Commissioners was in the West Front Committee Room, House of Lords, and the Commissioners for a long time did not hear cases elsewhere. In and after 1882, however, they occasionally exercised their clear power to sit in Scotland or Ireland, and heard cases in Glasgow, Dublin, and Belfast.

Sittings of the  
Railway Com-  
missioners.

During the fifteen years of their administration the Commissioners pronounced some two or three hundred decisions. Full reports of these, with head notes, were published from time to time by Messrs. Neville and Macnamara, and Messrs. Browne and Macnamara, and are now styled "Railway and Canal Traffic Cases." The Commissioners themselves in their annual reports to the Crown under the act commented on the more important cases, and printed them in an Appendix. The cases are also frequently referred to in this work, and tables of them are given at page 476. They are in the main decisions on the ever recurring question of *fact*—the question of *what is reasonable*. The Railway and Canal Commission may follow or disregard them as it pleases, and may even refuse to allow them to be cited as authorities, but it may perhaps be predicted that as the Commissioners followed the Court of Common Pleas, so the Railway and Canal Traffic Commission will follow the Railway Commissioners, the more especially if and so long as the *personnel* of the two Commissions shall remain in greater part the same, inasmuch as on questions of *fact* the opinion of the majority will still prevail.

The decisions of  
the Railway  
Commissioners.

(e) *Hall v. L. B. & S. C. R. Co.*, L. R., 17 Q. B. D. 230—C. A.

(f) See e.g., *Toomer v. L. C. & D. R.*

*Co.*, L. R., 2 Ex. 450; *South Eastern R. Co. v. Railway Commissioners*, L. R., 6 Q. B. D. 588—C. A.



2. *The Railway  
Commissioners.*

The Railway Commissioners cease to exist on the 31st of December, 1888, from and after which day their jurisdiction is transferred to—

3. *The Railway  
and Canal  
Commission.*

Establishment  
of the Com-  
mission.

3. *The Railway and Canal Commission.*

The temporary Regulation of Railways Act, 1873, 36 & 37 Vict. c. 48, from which the Railway Commissioners derived their jurisdiction, though perpetuated by the Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, s. 47, in most other respects, expires with respect to the Commissioners on the 31st December, 1887, that being the date to which the Expiring Laws Continuance Act of 1886 had continued it. On the expiration of the Act of 1873 there is established by sect. 2 of the act of 1888 "a new Commission styled the Railway and Canal Commission," in the act and in this book referred to as "the Commissioners," and consisting of two appointed and three *ex officio* Commissioners—the Commission to be a Court of Record.

The two  
appointed  
Commissioners.

The two appointed Commissioners are to be appointed by the Crown on the recommendation of the President of the Board of Trade, and one of them is to be "of experience in railway business:" (Act of 1888, s. 3.) They are, in furtherance of the common law rule that no judge ought to decide a matter on which he is himself interested (*y*), absolutely prohibited from holding railway stock of any kind: (*Id.* and Act of 1873, sect. 5.)

May not hold  
railway stock.

The three  
*ex officio*  
Commissioners.

Each of the three *ex officio* Commissioners is to be a judge of a superior Court, one to be nominated for England, one for Scotland, and one for Ireland, and none of them to be required to attend out of the part of the United Kingdom for which he is nominated. In and for England the nomination is to be made by the Lord Chancellor, who also makes regulations as to the arrangements for securing the attendance of the judge of the High Court nominated (sect. 4).

Sittings of  
Commissioners.

The Commissioners may sit in any part of the United Kingdom; but when holding a public sitting in London must hold it at the Royal Courts of Justice or at such other place as the Lord Chancellor may from time to time appoint.

Quorum

Not less than three Commissioners are to attend at the hearing of any case, and the *ex officio* Commissioner is to preside, "and his opinion upon any question which in the opinion of the Commis-

(1) See *Dimes v. Grand Junction Canal Co.*, 3 H. L. C. 759, in which the division

of Lord Cottenham, C., was set aside on the ground of his being a shareholder.

sioners" [not controllable by any Court (2)] "is a question of law shall prevail" (Act of 1888, sect. 5).

Every judge who is an *ex officio* Commissioner must attend to hear the Commission cases as soon as possible, "and any such judge shall be required to perform any of the other duties of a judge of a superior Court only when his attendance on the Commission is not required" (*Ib.* sub-s. 5). Provision is made for the appointment of temporary Commissioners in case of necessity (*Ib.* sub-ss. 6 and 7).

Attendance of  
*ex-officio*  
Commissioners.

The Commissioners have (1) *transferred to* them all the jurisdiction of the Railway Commissioners "under the Act of 1873, or any other Act or otherwise," to enforce facilities for traffic, to prohibit undue preference, and to supervise working agreements and terminal charges (Act of 1888, sect. 8); and (2) *conferred upon* them, in enlargement of these transferred powers, jurisdiction to enforce the obligations of special Acts, to award damages, to determine disputes as to rates charged for goods or animals, to order traffic facilities notwithstanding agreements, to enforce orders upon two or more companies by mutual arrangement, and to apportion expenses between companies and applicants for railway works (Act of 1888, sects. 9—16)—which jurisdictions we will now proceed to consider in detail.

General juris-  
diction of the  
Commissioners

#### 4. General Locus Standi before the Commissioners.

4. Locus Standi  
before the  
Commissioners.

The Commissioners have jurisdiction to enforce the observance of the Act of 1854 as amended by the Acts of 1873 and 1888, and of the 16th section of the Railways Regulation Act, 1868, and *also to entertain any complaint which they have jurisdiction to determine, made by—*

- (1) Any person or company complaining of any contravention of the above statutes, or of any enactment amending or applying them;
- (2) Any person appointed by the Board of Trade;
- (3) Any harbour board, conservancy authority, borough council, county council, justices in Quarter Sessions assembled, urban sanitary authority, or rural sanitary authority, without proof that the complainants are aggrieved; and
- (4) *Under the authority of a certificate from the Board of Trade, that it is in the opinion of the Board a proper body to make such complaint, any association of traders*

Locus standi  
before  
Commissioners

(2) See *Central Wales & Carmarthen Junction R. Co. v. L. & N. W. R. Co.*, 2 Nev. & Mac. 199.

4. *Locus Standi*  
before the  
Complaints.

or freighters, or chambers of commerce or agriculture, without proof that the complainants are aggrieved (Act of 1888, sect. 7);

5. In the case of an application for through rates, except by a company, any person interested who has made a complaint to and obtained a hearing from the Board of Trade (*Ib.* sects. 7 and 31).

Expenses  
of Local  
Authorities.

The expenses of any borough council, or other local authority in or incidental to any complaint to the Commissioners, may be defrayed out of the rates or funds out of which the expenses incurred by such authority in the execution of their ordinary duties are defrayed (sect. 54); and such authority may raise the necessary amount by borrowing, with the consent in the case of a harbour or conservancy authority of the Board of Trade, and in other cases of the Local Government Board (*ib.*).

Security of costs  
by Chambers of  
Commerce and  
duration of  
certificate.

In the case of chambers of commerce, &c., the Board of Trade may require security for costs. The certificate is in force for twelve months (Sect. 7).

No appeal on  
*locus standi*.

No appeal lies from the Commissioners upon any question regarding the *locus standi* of a complainant (Sect. 17).

5. *Enforcement of*  
*Railway and*  
*Canal Traffic*  
*Act, 1854.*

5. *Enforcement of Sect. 2 of the Railway and Canal Traffic Act, 1854.*

Traffic facilities.  
Undue prefer-  
ences and  
through rates.

The 2nd section of the Railway and Canal Traffic Act, 1854, as amended by sect. 25 of the Railway and Canal Traffic Act, 1888, which replaces the repealed sect. 11 of the Regulation of Railways Act, 1873, enacts that every railway and canal company shall (1) give all reasonable facilities for receiving, forwarding, and delivering their own traffic; (2) abstain from giving any undue preference to any particular person, company, or traffic; (3) give all reasonable facilities for receiving, and forwarding through traffic; and (4) receive, forward, and deliver through traffic at through rates; and the 11th section of the Act of 1888 provides that nothing in any agreement amongst themselves shall authorise a company to refuse such reasonable facilities as may in the opinion of the Commissioners be required in the interests of the public.

The 3rd section of the Act of 1854, as amended by the 6th section of the Act of 1873, and the 8th section of the Act of 1888, empowers the Commissioners to enforce obedience to the above law by mandatory injunction, or to prohibit disobedience by a restraining one; and the 14th section of the Act of 1888 empowers the Commissioners

to order two or more companies to carry into effect an order of the Commissioners, and to make mutual arrangements for that purpose (*k*).

The various enactments of the Traffic Acts in relation to the above subjects, together with the decisions of the Court of Common Pleas and Railway Commissioners upon the Acts of 1854 and 1873 are considered in detail hereafter (*l*).

### 6. *Enforcement of Special Acts.*

#### 6. Enforcement of Special Acts.

Where any enactment in a special Act—

- (a) contains provisions relating to traffic facilities, undue preference, or other matters mentioned in sect. 2 of the Railway and Canal Traffic Act, 1854 (*post*, p. 482); or
- (b) requires a railway company, canal company, or railway and canal company to provide any station, road, or other similar work for public accommodation; or
- (c) otherwise imposes on any such company any obligation in favour of the public or any individual, or where any Act contains provisions relating to private branch railways or private sidings,

the Commissioners have the like jurisdiction to hear and determine a complaint of a contravention of the enactment, as the Commissioners have to hear and determine a complaint of a contravention of sect. 2 of the Act of 1854, as amended by the Acts of 1873 and 1888 (Act of 1888, sects. 9, 23). There was no such jurisdiction under the Act of 1873, at any rate under the express terms of it. Whether the term "obligation" in paragraph (c) means only positive obligation (*m*), or whether it includes such a well known restriction as that from charging fares or rates beyond the Parliamentary maximum is not absolutely clear; but it is submitted that such a restriction is included. As far as "merchandise traffic" (*i.e.*, by sect. 55 traffic in goods or animals) is concerned, the Commissioners have by sect. 10 express jurisdiction to hear and determine any question involving the legality of any charge for the same, "and to enforce payment" of the same, "or so much thereof as the Commissioners decide to be legal."

(*k*) Thus getting rid of the effect of *Toomer v. L. C. & D. R. Co.*, L. R., 2 Ex. D. 450.

(*l*) See *post*, Chap. XII., Sects. 6 (Common Pleas), Sect. 7 (Railway Commissioners), and Sect. 8 (Railway and Canal

Commission), in which the main enactments are set out at length.

(*m*) *E.g.*, the obligation to carry under the Lancashire and Yorkshire Railway Act. See *post*, Ch. XII., Sect. 3, p. 446.

7 The Awarding  
of Damages.

*7. Jurisdiction to Award Damages.*

"Where the Commissioners have jurisdiction to hear and determine *any matter*, they may, in addition to or in substitution for any other relief, award to any complaining party who is aggrieved, such damages as they find him to have sustained," and the award of damages is to be in complete satisfaction of any claim for damages, including repayment of overcharges, which the party would have had; but it is provided (1) that no damages may be awarded unless complaint has been made to the Commissioners within one year of the discovery by the party aggrieved of the matter complained of; and (2) that in case of undue preference no damages shall be awarded if the Commissioners find that the rates complained of have been duly published, unless the complainant has complained in writing to the company, and the company has failed to comply with the reasonable requirements of the Commissioners within a reasonable time (Act of 1888, sects. 12, 13).

8. Working  
Agreements, &c.

*8. Supervision of Working Agreements, and of the exercise of Powers in relation to Steam Vessels and Canals.*

The Act of 1873 (sect. 10) transferred the existing supervision of the Board of Trade in the two firstly-named matters to the Railway Commissioners. The supervision of canal agreements was newly created by sect. 16 of the same act. The whole of the jurisdiction of the Railway Commissioners is transferred to the Railway and Canal Commission.

Railway working  
agreements.

Before railway companies enter into working agreements according to powers given them by a special act incorporating Part III. of the Railways Clauses Act, 1863 (*n*), they must give notice of their intention so to do in a form to be approved by the Commissioners, and the notice must set forth in what manner parties interested may object to the proposed agreement before the Commissioners. The agreement cannot have any operation until it is approved by the Commissioners, and the Commissioners "shall not approve" of it without being satisfied of its having received the sanction of a certain proportion of the shareholders of the agreeing companies convened by circular addressed to each shareholder, and also by newspaper adver-

(*n*) See post, Chap. XIV., Sect. 2. If the special act authorizing the agreement do not incorporate Part III. of the Act of

1863, the course of proceeding will be as directed by such special act.

tisements (o). At the end of the first or any subsequent period of ten years, the Commissioners may revise or modify the agreement in the interest of the public (p).

Similarly, in every seventh year after the passing of a special act incorporating Part IV. of the Railway Clauses Act, 1863, the Commissioners may, if of opinion that the interests of the public are prejudicially affected by the powers of the company relative to steam vessels, give to the company notice thereof; and if the company does not make provision to the satisfaction of the Commissioners for the protection of the public, or if the injury be irreparable, the Commissioners are bound to report their opinions to Parliament; and at the end of twelve months from the presentation of such report, the powers of the company relative to steam vessels either cease or become limited in accordance with such report (q). Steam vessels.

No railway or canal company may (except under special act prior to 21st July, 1873) enter, without the sanction of the Commissioners, into an agreement, giving a railway company the right to interfere in the management of a canal (r). The provisions of the Railway and Canal Traffic Act, 1888, as to traffic apply to canal companies so far as applicable (s), and the Commissioners have a special power, on the application of any person interested in a canal, in any case where a railway company controls the canal, and it is proved that the charges for merchandise traffic are "such as are calculated to divert the traffic from the canal to the railway, to the detriment of the canal or persons sending traffic over the canal or other canals adjacent to it," to interfere by (1) making an order requiring the charges on the canal to be reasonable as compared with the charges on the railway, and (2) themselves altering the charges if their order shall not be complied with (Act of 1888, sect. 38). Canal traffic

### 9. *Jurisdiction as to Publication of Rates, and disputes as to Terminals.*

The Commissioners have power to enforce the keeping of rate books by railway and canal companies, which books must show "every rate for the time being charged" from each station to the place where they book (t). They may make orders to distinguish

(o) Act of 1873, s. 10, sub-s. 1; R. C. Act, 1863, ss. 22—25.

(p) Act of 1863, s. 27.

(q) Act of 1873, s. 10, sub-s. 2; R. C. Act of 1863, s. 23.

(r) Act of 1873, ss. 16, 17. And see further Ch. XIV., Sect. 5. post.

(s) Act of 1888, s. 36.

(t) Act of 1873, s. 11.

*9. Publication of Rates and Terminal Charges, &c.*

9. *Publication of  
Rates and Ter-  
minal Charges,  
&c.*

"terminals," *i.e.*, amounts payable to companies under their special acts "for loading and unloading, covering, collection, delivery and other services of a like nature," from tolls, *i.e.*, amounts payable "for the use of the railway or canal, for the use of the carriages or vessels, and for locomotive power," and may decide, finally, what is a reasonable sum to be paid for "terminals" (*u*).

#### 10. *Arbitrations.*

Arbitrations  
between com-  
panies.

The jurisdiction as to arbitrations is very wide. By sect. 8 of the Act of 1873, any difference between railway companies, or between canal companies, or between a railway and a canal company, which is by statute referable to arbitration, stands referred to the Commissioners at the instance of any company, party to the difference (*x*). And if the Board of Trade is designated arbitrator by statute, the Board may, if it thinks fit, transfer the arbitration to the Commissioners (*y*). Many arbitrations of an important character were entertained by the Railway Commissioners (*z*).

Arbitrations  
generally.

By sect. 9 of the Act of 1873, any difference to which a railway company is a party may, on the application of the parties, and with the assent of the Commissioners, be referred to them for decision.

Railway rating.

Under this section, the Railway Commissioners heard rating cases (*u*).

#### 11. *Appeal from Commissioners.*

#### 11. *Appeal from the Commissioners.*

By the 18th section of the Act of 1888, the Commissioners have full jurisdiction to hear and determine power to decide all questions whether of law or of fact, but by sect. 17 there is an appeal from the Commissioners to a "Superior Court of Appeal," *i.e.*, by sect. 55

(*u*) Act of 1873, s. 16. And see post, Ch. XVI., Sect. 3.

(*x*) The Railway Commissioners gave a liberal construction to this section. Where two companies agreed to refer all differences that should arise between them as to the purchase of the railway of the one by the other company, in accordance with the provisions of the Railway Companies Arbitration Act, 1859, the Commissioners, being applied to by the selling company to determine a difference which had arisen, overruled an objection on behalf of the purchasing company to their jurisdiction arising within the meaning of the section. *Stokes Day R. Co. v. L. & S. W. R. Co.*, 2 Nev. & Mac.

143. The Railway Commissioners also held that power to refer, given in the special act to a dissolved company, passes on to an amalgamated company. *Torbay and Brixham R. Co. v. South Devon R. Co.*, July 4th, 1876.

(*y*) 37 & 38 Vict. c. 40, s. 6.

(*z*) See post, Chap. XV., Sect. 2. See *Whidonian R. Co. v. Grinstead and Wemyss Bay R. Co.*, 2 Nev. & Mac. 122, and other cases referred to in Brown's Practice, p. 91.

(*u*) See for instance, *Manchester, Sheffield and Lincolnshire R. Co. v. Outwater Union*, 2 Nev. & Mac. 53.

to the Court of Appeal in England or Ireland, and to the Court of Session in either division of the Inner House in Scotland. It does not lie upon any question of fact or *locus standi*, and cannot be brought except in conformity with such rules of Court "as may from time to time be made in relation to such appeals by the authority having power to make rules of court for the Superior Court of Appeal." The decision of the Superior Court of Appeal is final, except that where there has been a difference of opinion between any two of such superior courts, any superior court of appeal in which a matter affected by such difference of opinion is pending may give leave to appeal to the House of Lords, on such terms as to costs as such court shall determine.

Except as above, an order of the Commissioners cannot be questioned, nor can it be "restrained or removed by prohibition, injunction, certiorari, or otherwise, either at the instance of the Crown or otherwise" (Act of 1888, sect. 17). No prohibition.

## 12. Procedure.

## 12. Procedure.

Parliamentary Agents may practise before the Commissioners if they had practised as Parliamentary Agents for two years before the passing of the Act (Act of 1888, sect. 51). "In any proceedings any party may appear, either by himself in person, or by counsel or solicitor" (ib., s. 50). Parliamentary Agents.  
Solicitors.  
Counsel.

The Commissioners may make, rescind, and vary general rules with the approval of the Lord Chancellor and the Board of Trade, which are to be laid before Parliament within three weeks, and are to take effect as if enacted in the Act itself (ib., s. 20). The rules under this section are printed at length in Volume II. General rules



## CHAPTER XII.

STATUTORY REGULATIONS RELATING TO THE WORKING OF RAILWAYS  
WHEN CONSTRUCTED.

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1. Use of Railway  
as Highway.1. Of the Use of a Railway as a Highway, and of the Obligation  
to permit Branch Railways to be constructed.

Right of public  
to bring their  
own engines on  
line.  
R. O. Act, ss.  
92, 108.

It was originally in the contemplation of the Legislature to treat a railway as a common highway, open alike to all persons who might choose to put carriages thereon. The Railways Clauses Act of 1845 enacts (sect. 92) that, on payment of the tolls demandable, all companies and persons shall be entitled to use the railway, with engines and carriages properly constructed, subject to 5 & 6 Vict. c. 55, and to the regulations made by the company, and further provides (sect. 108) that no regulations of the company shall authorize the closing of the railway, or prevent the passage of engines or carriages thereon, at reasonable times. In fact, "the notion of the railway being a highway for the common use of the public, in the same sense that an ordinary highway is so, was the starting point of English railway legislation. It is deeply engrained in it. In the early days of rail-

ways it was acted on at least occasionally, and in respect of goods traffic, and although it enters but slightly into modern railway practice, no proper understanding of a good deal of our railway legislation, and pre-eminently of clauses relating to tolls or charges, can be arrived at, unless it is firmly grasped and steadily kept in view" (a).

It is also enacted, by sect. 76, that adjoining landowners or any other persons may lay down branch railways "for the purpose of bringing carriages to or from or upon the railway," and that the company shall make openings in the rails, "and such additional lines of rails as may be necessary" for effecting communication where it can be made with safety to the public. This right is, by the same section, subject to the restrictions—(1) that the branch railway shall not run parallel to the main line; (2) that the company shall not be bound to make openings in places set apart by them for certain specific purposes; and (3) that the persons using the railway "shall be bound to construct, and from time to time, as need may require, to renew the offset plates and switches (b) according to the most approved plan adopted by the company and under the direction of their engineer."

This section imposes no prohibition on the company making an opening at a station, and it seems that a consent once given to such an opening, or to any other opening, cannot be revoked (c), and specific performance will be granted upon an implied consent (d). When the branch is ready for use, the bye-laws of the company owning the main line must be reasonable (e). Where a company on the order of the Board of Trade provided the junction with an improved system of interlocking and signalling apparatus, and refused the user of the junction unless the owner of the branch would pay the expense of such system, Bacon, V.-C., granted an injunction to compel the free allowance of the user on the ground that the 76th section applied, but ~~Court of Appeal~~ Court of Appeal granted the injunction upon the different ground that the owner of the branch was entitled to such free user by virtue of an earlier special Act (f).

The public, therefore, have a clear theoretical right to use the railway as a highway, and the right given by the 76th section would seem to be ancillary thereto. It is to be remarked, however, that that section speaks of "carriages" only, whereas the 92nd section

Branch railway  
s. 76.

Right of public  
to use railway  
as highway is  
clear in theory.

(a) Per Wills, J., in *Hall v. L. B. & S. C. R. Co.*, L. R., 15 Q. B. D. at p. 538.

(b) According to the meaning of those terms in 1845. See *Woodruff v. Brecon and Merthyr Tydvil R. Co.*, L. R., 28 Ch. D. 190—C. A.

(c) *Bell v. Midland R. Co.*, 3 De Gex & J. 678.

(d) *Laird v. Birkenhead R. Co.*, 29 L. J., Ch. 218.

(e) *Rhymney R. Co. v. Taff Vale R. Co.*, 30 L. J., Ch. 482.

(f) *Woodruff v. Brecon and Merthyr Tydvil R. Co.*, L. R., 28 Ch. D. 190; 54 L. J., Ch. 620; 52 L. T. 69; 33 W. R. 125—C. A.; affirming Bacon, V.-C.

As to jurisdiction of Railway Commissioners in respect of sidings, see *Girardot, Flinn & Co. v. Midland R. Co.*, 5 R. & C. T. 60.

1. *Use of Railway as Highway*

speaks of "engines and carriages." So that the 76th section might have been intended to apply only to the case of the owner of the branch line bringing waggons as far as the junction, to be thence drawn along the main line by the company's own engines.

Refusal of Court of Chancery to enforce right.  
*Powell Duffryn (v. Taff Vale R. Co.)*

But, however theoretically perfect the right of the public may be, experience has shown that for purposes of safety it is necessary that the traffic on a railway should be exclusively under the control of the company owning the line (*g*). It has been said, too (by Wood, V.-C.), that the right to use the railway gives no right to use the stations, and suggested that the intention of the Legislature was that the owners of the branch lines should make stations of their own (*h*). And in the important case of *Powell Duffryn Steam Coal Co. v. Taff Vale R. Co.* (*i*), James and Mellish, L.L.J., declined to grant an injunction to enforce the right. The ground of this decision was, that inasmuch as the plaintiffs could not run over the defendants' line without a proper working of the points and signals by the defendants themselves, the granting of the injunction would be useless unless accompanied by an order for the working of the signals, and that such working being a continuous act, the Court could not see to the performance of it. In giving judgment, James, L.J., observed:—

"True it is, that under the 76th and 92nd sections of the Railways Clauses Consolidation Act, the plaintiffs appear to have the right given to them of using this railway with their engines; but, as pointed out by Wickens, V.-C. (before whom the case was first heard), and afterwards by Hall, V.-C., it is impossible for them to exercise that right without danger, unless there is a continuous use of the signals and of the points by the defendant's own people. Now it is, I think, impossible to say that a company ought to be compelled by this Court to trust its points and signals, upon which so much of the safety of mankind now depends, to any other persons than its own pointsmen and its own signalmen. If, therefore, relief is given to the plaintiffs, it must, in substance, involve ordering the defendants to work the points and signals. But it is not the practice of this Court to compel, by injunction, either a company or an individual to do a continuous act which requires the continuous employment of people. The Court will, in a proper case, restrain a man from singing at one theatre, but it will not compel him to sing at another; it may restrain him from writing a book for one publisher, but it cannot compel him to write a book for another. Where what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labour and care, the Court has never found its way to do this by injunction. Both the learned Vice-Chancellors say that in all their experience they have never known such an injunction granted. My experience is the same. I think, therefore, that the order dismissing the bill must remain affirmed. At the same time, it is to be

(*g*) See *R. v. London and South Western R. Co.*, 1 Q. B. 558, a ruling case, in which Lord Denman said that the supposition of a free competition of carriers on the same railway was practically little else than absurd.

(*h*) *Midland R. Co. v. Ambergate R. Co.* 10 Haro, 359.

(*i*) L. R., 9 Ch. 331; 43 L. J., Ch. 575; 30 L. T. 208, affirming the decision of Hall, V.-C., 29 L. T. 575.

observed that the plaintiffs come here to enforce a right which the Act of Parliament gives them, and which the Legislature intended them to have, the question as to the approval of the engines being a mere thing thrown in, and the real question between the parties having throughout been whether the plaintiffs have a right to use the railway at all. The plaintiffs fail only because of the difficulty in the way of this Court's enforcing such a right, a difficulty which, to my mind is insuperable. As their case fails, then, not on the merits, but on the ground of the difficulty of giving them a remedy, I think that the bill should be dismissed without costs."

Mellish, L.J., concurred, and had observed in the course of the argument that he was "disposed to think a court of law would feel the same difficulty as to a mandamus." A mandamus is no doubt a discretionary writ, and the consideration of public inconvenience would weigh strongly, if not irresistibly, with the Court if an application were to be made for the purpose of enforcing the right to use a railway as a highway adversely to the owning company. But, looking to the very clear terms of the statute, it is submitted that a case might arise in which a mandamus might issue to a railway company, not perhaps to admit the engines and carriages of other persons, but to make regulations, under sect. 108 of the Railways Clauses Act, for their admission. Perhaps also relief might be obtained from the Railway and Canal Commission, and a distinction might be drawn, (1) between railways opened for goods traffic only and passenger railways, and (2) between railway companies running a sufficient number of trains and railway companies running an insufficient number. Before leaving the subject it may be observed, that so far back as 1840 a Committee of the House of Commons had reported that "the right secured to the public by the railway Acts of running their engines and carriages on the railways was practically a dead letter, (1) because no provision had been made for ensuring to independent trains and engines access to stations and watering-places along the lines; (2) because rates for tolls limited by the Acts were almost always so high as to make it difficult for independent persons to work at a profit, and (3) because the necessity of placing the running of all trains under the complete control of one head interposed numerous difficulties in the way of independent traders. The right to use the railway as a highway was, however, deliberately preserved to the public by the Railways Clauses Act, passed five years afterwards. In 1872 we find the Joint Select Committee on Amalgamation observing:—

Refusal of Court  
to enforce right  
of public

Reasons why  
right is a dead  
letter.

"There is the clearest evidence that running powers can be worked on crowded lines without difficulty, and without obstruction to the traffic. But in all these cases it has been done by agreements with the owning company (see sect. 87), which then takes command of the traffic, settles the time-tables, and is responsible

Running powers  
by agreement.

1. *Use of Railway  
as Highway.*

for the local management. There is no evidence that any such powers, however stringent, have ever operated when the owning company set itself to resist them. On the contrary, there is strong evidence that all attempts hitherto made to force these powers on unwilling companies have failed. . . . It is a further consideration of some importance that running powers would, as is admitted by those who have advocated them, seldom be exercised in a hostile manner, whilst, if so exercised, it is obvious that they might be productive of great inconvenience, if not of danger. It is also urged, that if they were extensively and hostilely used, they would cause great waste of power and money, since engines would be run without full loads. It is further pointed out, that if they were granted, universally, their operation might be to enable a distant company to invade a company already carrying the traffic of its own district in a satisfactory manner, not for any purpose of public convenience, but merely for the purpose of compelling the latter company to part with a portion of its traffic."

The Committee therefore resolved, that "it was not expedient by general legislation to grant to every company running powers over the lines of other companies," and added, that it appeared doubtful whether there was any advantage in generally retaining the "toll clauses" (see sects. 92, 108), which already give universal running powers.

2. *Regulations as  
to Engines and  
Carriages.*

2. *Regulations as to Engines and Carriages brought upon the  
Railway.*

R. C. Act, ss.  
114—123.

Consumption of  
smoke by engine.

Approval of  
engines and  
carriages by  
owning com-  
pany.

Every locomotive steam-engine, whether belonging to the company owning the line or not, must be constructed on the principle of consuming its own smoke, otherwise the party using it is liable to a penalty (*k*), and that although the engine be constructed on the principle of consuming its own smoke, but fail to do so "as far as practicable," through the default of the company or its servants (*l*). An injunction has been granted to restrain a company from allowing smoke to escape from a large number of engines kept at a shed and sidings during the process of lighting the engine fires (*m*). No engine may be brought on the rails unless first approved of by the company; and, on receiving notice, the company are required to send their agent to examine the engine, and to report thereon; and within seven days after the report, if the engine be proper to be used, the company must give a certificate of their approval. If an engine is out of repair, or unfit to be used, the company may forbid its use until it has been repaired; and a difference of opinion as to the fitness of

(*k*) 8 & 9 Vict. c. 20, s. 114, vol. II.

(*l*) Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 16, avoiding the effect of *Manchester, Sheffield, &c. R. Co.*

*v. Wood*, 2 E. & E. 344, where the former enactment had been construed otherwise.

(*m*) *Smith v. Midland R. Co.*, 37 L. T. 234.

an engine or carriage is to be settled by arbitration (n). If improper engines or carriages are brought upon the railway, or used, a penalty is incurred (o). No carriage may be upon the railway (except in directly crossing the same) unless it be of the construction, and in the condition which the regulations of the company require (p). All regulations made by the company respecting carriages must be in writing under their common seal, and must be applicable alike to the carriages of the company, and to the carriages of other persons using the railway; and a copy of such regulations may be demanded by all persons. The owners of carriages using the railway must enter their names, and the number, weights, and gauges of their carriages, and also paint the same particulars on the carriages, if required so to do; and the carriages may be measured, &c., at the expense of the company; on default, the company may remove the carriage. If a carriage be improperly loaded, or suffered to obstruct the railway, it may be unloaded or removed, and all expenses must be paid by the owner; and the company are not liable for any damage or loss occasioned by unloading or removing a carriage or goods, except for their wilful or negligent acts, or any wrongful detainer. The owners of engines and carriages on the railway are answerable for any trespass or damage done by them or their servants, and servants may be convicted before two justices; and the owner may recover any money paid by him from his servant, in the manner prescribed.

Sect. 116.

Sect. 117.

Sect. 118.

Sect. 120.

Sect. 122.

Sect. 124.

### 3. Of the Power to act as Carriers.

#### 3. Power to Carry.

The rights and liabilities of railway companies as carriers generally are fully discussed in a subsequent chapter (q). It will be well, however, in this place to refer briefly to the statutory law of this branch of the subject. The power to carry is derived from the 86th section of the Railways Clauses Act (p. 447, post), which is clearly permissive (r).

(n) Upon a reference to the Railway Commissioners, under sect. 8 of the Regulation of Railways Act, 1873 (p. 442, ante), the Commissioners held that a "Fairlie engine," weighing from sixty to seventy tons, and having an extreme width of ten feet, was not unfit to be brought over the Northampton and Banbury Railway from Green's Norton to Blisworth under running powers, the Commissioners having themselves inspected the places for which the engine was said to be unfit. *East and West Junction R. Co. v. Northampton and Banbury R. Co.*, 2 Nev. & Mac. 293.

(o) These sections contain nothing which deprives the railway company of the common law right to distrain on uncertified engine, damage feasant, if it comes on their railway; and the remedy given by sect. 116 is cumulative. *Ambergate, &c. R. Co. v. Midland R. Co.*, 23 L. J., Q. B. 17; 2 E. & B. 793.

(p) See *Rhymney R. Co. v. Taff Vale R. Co.*, 20 L. J., Ch. 482.

(q) See Chap. XVI., post.

(r) *Johnson v. Midland R. Co.*, 4 Ex. 367. As to power of the Railway and Canal Commission to compel a company to carry, see p. 485, post.

3. *Power to carry.*

Special obligation to provide locomotive power, &c.

Occasionally, however, the special act imposes upon the company the obligation to act as carriers. Thus, by the 73rd section of the Lancashire and Yorkshire Railway Act, 22 & 23 Vict. c. cx., it is provided as follows :—

“The company shall, from time to time, and at all times, provide sufficient locomotive power, when and as the same shall be required, and as soon as an adequate and sufficient load shall be in readiness, to convoy all merchandise, articles, empty waggons, matters and things upon and along their railways.”

*L. & Y. R. Co. v. Gidlow.*

It was upon the construction of the above section that it was held by the House of Lords, in *Lancashire and Yorkshire R. Co. v. Gidlow* (s), that where the company had refused to forward coals except for persons having ready 15 waggons with a minimum load of 4 tons in each waggon—a regulation which an arbitrator had found to be an unreasonable requirement—the restriction was not warranted, and a colliery owner, who suffered in his business from its operation, was entitled to recover damages from the company.

An obligation in a special act upon a lessee company to supply locomotives, rolling stock, &c., has been enforced at the instance of traders using the demised line (t).

Enforcement of obligation to carry by Railway and Canal Commission. Obligation to lay down additional rail.

The obligation to carry under special acts may be enforced by the Railway and Canal Commission (ante, p. 435).

For obligation to lay down an additional rail on requisition of the Board of Trade, and enforcement of it at the request of the public, see the *Launceston Case* (u).

Certain direct obligations.

The 89th section of the Railways Clauses Act gives the company the benefits of every protection which common carriers enjoy. It has been deemed expedient, however, to impose special obligations on railway companies acting as carriers. The obligation to afford reasonable traffic facilities, imposed by the 2nd section of the Railway and Canal Traffic Act, 1854, the restriction upon special contracts imposed by the 7th section of the same act, and the “equality clause” of the Railways Clauses Consolidation Act, 1845, all apply to the companies in this capacity, as well as in their capacity of owners of their line.

Smoking compartments.

It is provided by the Regulation of Railways Act, 1868 (x), that all railway companies, except the Metropolitan R. Co., in every passenger train where there are more carriages than one of each class, must provide smoking compartments for each class of passengers unless exempted by the Board of Trade, and the Revenue Act, 1884, 47 & 48

(s) *L. R.*, 7 H. L. 517. The Great Northern Railway Act of 1850, 13 & 14 Vict. c. lxi., contains a similar section (s. 16), with the proviso that “all minerals shall be presented to the company in waggons fitted to travel on the railway at the

ordinary speed.”

(t) *Watkinson v. Wigham, &c. R. Co.*, 3 Nev. & Mac. 164.

(u) 3 Nev. & Mac. 137.

(x) 31 & 32 Vict. c. 119, s. 20.

Vict. c. 62, s. 12 (see vol. II.), enables any railway company to apply to the Inland Revenue for a licence for the sale of tobacco "by any means personal, mechanical, or otherwise," in any railway carriage of which they are proprietors.

Tobacco  
licences.

Companies are liable to heavy penalties in case they provide trains, or stop ordinary trains at any place not an ordinary station, to accommodate parties attending a prize fight.

Trains for prize  
fights.

Every company must provide and maintain in every passenger train which travels more than twenty miles without stopping, efficient means of communication between passengers and the servants of the company. Passengers using such means of communication without sufficient cause are liable to a penalty (y). A train is or is not within this enactment according to the actual intention of the company of stopping or not within the twenty miles, and that this intention may be collected from the instructions of the company's servants and the time-tables taken together (z).

Communication  
between pas-  
sengers and com-  
pany's servants.

#### 4. *The Power to take Tolls; the Toll Clauses of the Special Acts; and the Impending Revisions under the Act of 1888.*

4. Power to take  
Tolls.

The power to take tolls, so far as it is derived from the Railways Clauses Act is contained in the 86th and 92nd sections. The 86th section is as follows:—

R. C. Act, ss. 86,  
92.

"It shall be lawful for the company to use and employ locomotive engines or other moving power, and carriages and waggons to be drawn or propelled thereby, and to carry and convey upon the railway all such passengers and goods as may be offered to them for that purpose, and to make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the special Act authorized to be taken."

Power to make  
"reasonable"  
charges.

The expression "reasonable" in this section does not seem to have come under the notice of the Courts. It is clear that grammatically it imposes some limit on the otherwise absolute discretion of the company to charge as they please within the maximum of the special act, so as to make it a question of fact in each case what is a reasonable sum, and to allow every charge made by a company for carriage to be submitted to a jury. It might be argued, however, that the practical result of this would be so inconvenient, that the word "reasonable" ought to be rejected. It might also be argued that the expression reasonable has reference merely to the equality clause

Meaning of  
"reasonable."

(y) 31 & 32 Vict. c. 119, s. 22.  
(z) *Blamires v. L. & Y. R. Co.*, L. R., 8 Ex. 283; 42 L. J., Ex. 182—Ex. Ch. In this case the primary cause of an accident was the breaking of a tire, without negligence. Several minutes elapsed be-

tween the breaking of the tire and the happening of the accident. It was held, that there was evidence on which the jury could find that the omission of the statutory provision conducted to the accident.



4. *Power to take Tolls.*

\* See p. 400.

† See p. 493.

(sect. 90<sup>1</sup>), and that any charge within the maximum might be sustained, so long as it was equal. Lastly, it might well be contended that the term "reasonable" was intended to apply only to ambiguous classifications occurring in the toll clauses of the special acts. On the other hand, it might be urged that the intention of the Legislature was to impose an indefinite check of "reasonableness" upon the charges in addition to the definite one imposed by the maximum of the special act. The relation which any fixed maximum charge would bear to a fairly remunerative charge would continually vary with the value of money and other disturbing causes; and as there is no self-acting power for revision of tolls (revision under 7 & 8 Vict. c. 85, requiring a special act †) the Legislature must, it might be said, be taken to have purposely adopted the crude method of allowing all charges to be disputable between the railway companies and their customers. It is submitted that the latter view is the correct one, on the simple ground that any special meaning of the term reasonable would have been expressed, if the Legislature had intended such special meaning to be given to the term; and that therefore it is open to any customer of any company to dispute any charge for carriage made by it, although within the maximum fixed by the special act; and this appears to have been the view of the Railway Commissioners, who observed in their Fourth Report (par. 14) :—

"It is well known that the charges which a company may take must not exceed the maximum tolls authorized by special act. It has been less noticed that they must also be reasonable, and even where a company is empowered to charge any rate it thinks proper, as for the carriage of packages not exceeding a certain weight, generally five hundredweight, the power is not absolute, the charge must still be a reasonable sum. We have had from time to time complaints made to us of high charges on local traffic, and it deserves consideration whether it would not be well that this important statutory qualification of reasonableness were made of practical value, and security taken for its being observed, by our being authorized to enjoin the reduction of unreasonable charges, just as we enjoin the reduction of unequal charges."

Jurisdiction of  
Railway and  
Canal Commis-  
sion as to rates  
for merchandise.

The Railway and Canal Commission, which has now superseded the Railway Commissioners, in addition to its jurisdiction in respect of undue preferences, &c. (as to which see ch. XI. and ch. XII., sect. 8, post), has the following jurisdiction as to railway or canal rates for *merchandise* traffic, under s. 10 of the Railway and Canal Traffic Act, 1888 :—

"Where any question or dispute arises, involving the legality of any toll, rate or charge, or portion of a toll, rate or charge, charged or sought to be charged for merchandise traffic [*i.e.*, by s. 55 traffic in goods, cattle, live stock and animals of all descriptions] the Commissioners shall have jurisdiction to hear and determine the same, and to enforce payment of such toll, rate or charge, or so much thereof as the Commissioners decide to be legal."

It will be observed that this section applies to merchandise traffic only, that it confers the jurisdiction in terms which point to an arbi-

tration, and that is enforcement of payment of what is due, not prohibition of charging what is not due which it expressly authorizes.

The Board of Trade also by sect. 31 of the same Act (the "conciliation clause") has the power of entertaining complaints of unreasonable charges conferred upon it in the following terms:—

Complaint to Board of Trade of unfair rates, &c.

(1.) Whenever any person receiving or sending or desiring to send any goods by any railway is of opinion that the railway company is charging him an unfair or an unreasonable rate of charge, or is in any other respect treating him in an oppressive or unreasonable manner, such person may complain to the Board of Trade.

(2.) The Board of Trade, if they think that there is reasonable ground for the complaint, may thereupon call upon the railway company for an explanation, and endeavour to settle amicably the differences between the complainant and the railway company.

(3.) For the purpose aforesaid, the Board of Trade may appoint either one of their own officers or any other competent person to communicate with the complainant and the railway company, and to receive and consider such explanations and communications as may be made in reference to the complaint; and the Board of Trade may pay to such last-mentioned person such remuneration as they may think fit, and as may be approved by the Treasury.

By sub-s. 4 the Board of Trade is to submit to Parliament reports of complaints made under the section, and by sub-s. 5 a complaint under the section may be made by any of the authorities having a locus standi before the Railway Commission under sect. 7 of the Act (ante, p. 433).

This section applies to passenger as well as merchandise traffic. It is purely tentative, and the working of it will rest entirely with the Board of Trade, which Board, however, though not so authorized by the section, is not debarred by it from putting the law in force under 7 & 8 Vict. c. 85 (see ch. X., sect. 10, p. 420) or the Traffic Act (see ch. XI., sect. 14, p. 433), against any company complained of.

It is noticeable that the Legislature has not in the Act of 1888 chosen in express terms to give the Commissioners or the Board of Trade the power directly to restrain unreasonable charges, not being preferential, which are within the Parliamentary maximum. It is conceived however that such jurisdiction is sufficiently given to the Commission by sect. 9, par. (c) of the Act of 1888 (see ch. XI., sect. 6, p. 435, ante). It would, of course, in any event, lie upon a customer to prove to any tribunal that any particular charge was unreasonable.

In *Myers v. London and South Western R. Co.* (a), it was held that a railway company is not bound to carry by their shortest route, and may charge their maximum for goods conveyed on an indirect route according to the distance actually travelled. There the defendants received goods to be carried from Southampton to "Luton to order viâ Great Northern." The goods were conveyed in the same truck, without unloading, on the defendants' railway from Southamp-

Reasonable route.  
*Myers v. L. & S. W. R. Co.*

(a) L. R., 5 C. P. 1; 39 L. J., C. P. 37, the route and the amount charged were reversing a decision of a county court judge, who, however, had held that both reasonable.

4. *Passes to take Toll.*

ton, through Clapham Junction, to the defendants' goods station at Nine Elms. From Nine Elms they were carried back to Clapham Junction, from Clapham Junction to Blackfriars on the London, Chatham and Dover line, from Blackfriars to King's Cross on the Metropolitan and Great Northern lines, and from King's Cross to Luton by the Great Northern Railway. The plaintiff contended that the defendants were not entitled to charge for the distance between Clapham Junction and Nine Elms and back, but the Court held that they were.

(Charge of tolls according to "geographical distance," G. E. R. Act, 1862.

In connection with this branch of the subject, it may be useful to direct attention to the following section (sect. 237) of the Great Eastern Railway Act, 1862 (25 & 26 Vict. c. cccxiii.) :—

"All tolls and sums of money to be charged by the company in respect of passengers, animals, or goods of any description conveyed on the Yarmouth line, the Norwich and Brandon line, the Dereham branch and the Lowestoft branch respectively, or any of them, shall be fixed and regulated, and shall be charged with reference, as nearly as may be, to the number of miles which the stations on the said railway between which such passengers, animals or goods are conveyed are distant from one another according to their geographical position, and not with reference to the length of the railway between which such stations and the number of miles over which the said passengers, animals or goods may have been actually conveyed: Provided always, that such tolls and charges shall be made equally and without favour to all persons and companies using the said railway under the same circumstances."

The 86th section of the Railways Clauses Act seems only to apply to the usual case of the company acting themselves as carriers.

R. C. Act, s. 92

The 92nd section provides :—

"It shall not be lawful for the company at any time to demand or take a greater amount of toll, or make a greater charge for the carriage of passengers or goods than they are by this and the special act authorized to demand . . ."

\* See p. 440.

This section (which proceeds to give all persons the power to use the railway on payment of tolls\*) applies not only to the case of the company acting as carriers, but also to the case of the company merely owning the line.

Meaning of "toll," s. 3.

The 3rd section provides that the word "toll" shall include "any rate or charge or other payment payable under the special act" for any passenger, animal or goods conveyed on the railway.

Construction of ambiguous toll clause.

It has been said in the House of Lords, that where there is any ambiguity in a clause of a special act imposing rates, tolls or duties, that construction is to be adopted which is the more favourable to the public (*b*); but some doubt has also been thrown in that House on this rule of construction (*c*). The rule is based on two grounds

*b*) *Stockton R. Co. v. Butterell*, 11 Cl. & F. 591, per Lords Brougham and Lyndhurst; *Pryer v. Monmouthshire R. & Canal Co.*, L. R., 4 App. Cas. 197, per Lords Penzance and O'Hagan. See also *Parker v. Great Western R. Co.*, 4 Railw. Cas.

563; *Stonbridge Canal Co. v. Wetherley*, 2 B. & Ad. 792.

(*c*) *Pryer v. Monmouthshire R. & Canal Co.*, L. R. 4 App. Cas. 197; per Lords Cairns and Selborne.

(1) that a tax on the public is not to be presumed, and (2) that the special acts are framed by the promoters in their own language. The first ground does not apply so strongly to acts like railway special acts, regulating payment for services rendered as it does to acts imposing taxes simpliciter; but the second ground appears to apply to such acts with unqualified force, and it is submitted that upon this second ground the rule of construction above stated is a sound one, and ought to be adhered to.

A list of all the tolls authorized by the special act, and which shall be exacted by the company, must be exhibited at all stations where tolls are payable (*d*) (sect. 93), and mile-stones and posts, at the distance of one quarter of a mile from each other, must be set up and maintained by the company (sect. 94), otherwise "no tolls shall be demanded or taken for the use of the railway;" and penalties are incurred for defacing notice-boards or mile-stones (sect. 95.)

Publication of  
tolls.  
R. C. Act, 47.  
93—95.  
Mile-stones.

Questions of some little importance arise as to the construction of these sections (93, 94, 95). They clearly make publication of some kind a condition precedent to the right to recover toll, but what they require to be published is not quite so clear. Do they apply to the maximum tolls only, and to the tolls for the use of the railway only, or do they apply to all tolls actually charged (*e*), for the use of the railway, and of engines and of carriages, or do they comprehend all tolls both maximum and actual of whatever kind? The 93rd section seems easily to bear the most comprehensive construction, but the 95th has a more restrictive appearance. It would be useless to contend that the 95th section, which deprives the company of their right to toll in case of non-publication, applies to the case where they act as carriers; but perhaps the true solution of the question may be that though the companies are directed under the penalty of sect. 95 to publish only the tolls for the use of the railway, they are nevertheless directed, though without being subject to penalty of sect. 95 for non-compliance with the direction, to publish all tolls and fares both maximum and actual. The authority of three cases—decided independently of each other—is in favour of the more restrictive construction. In an early case (*f*), the Court of Queen's Bench considered it "very doubtful" whether a clause in a special act, very similar to sects. 94, 95, applied to the company acting as carriers. More recently, the Queen's Bench Division of the High Court has, with

Publication a  
condition pre-  
cedent to right  
to recover

Clauses re-  
quiring publi-  
cation, construed  
as inapplicable  
to company as  
carriers.

(*d*) See *Fripp v. Bridgewater and Tarnant Canal and R. Co.*, 22 L. J., Ch. 1084; 17 Jur. 887.

(*e*) As to this, see *Greson, app., Potter, resp.*, L. R. 4 Ex. D. 142, where, by a pier company's act it was enacted that all tolls

authorized for the time being should be published, and it was held that this applied to actual tolls.

(*f*) *Garton v. Bristol and Exeter R. Co.*, 30 L. J., Q. B., at p. 295. The special act was (1 Geo. 4, c. 57) s. 188.

4. Power to take Tolls.

reference to sect. 95 of the Railways Clauses Act itself, expressed a decided opinion to the same effect (*g*); and the Court of Session in Scotland has construed the 88th section of the Scotch Railways Clauses Act, which is identical with sect. 95 of the English Statute, in a similar manner (*h*). Nor does there seem to be any authority to a contrary effect. And both in the special acts and in ordinary language, "toll" seems to signify the payment for the use of the railway as a highway, "fare" the passenger's payment, and "rate" and "charge" both the passenger's payment and the payment for goods, the terms "fare," "rate," and "charge" being all applied to charge made by the companies as carriers (*i*).

Publication of fares for passengers.  
R. R. Act, 1868, s. 16.

The publication of passenger fares is expressly provided for by the 15th section of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), as follows:—

"Every company shall cause to be exhibited in a conspicuous place in the booking office of each station on their line, a list or lists painted, printed or written in legible characters, containing the fares of passengers by the trains included in the time tables of the company, from that station to every place for which passenger tickets are there issued."

But, although sect. 40 of the same act prescribes a mode of recovering penalties imposed thereby, neither in that section nor in any other part of the act is any penalty imposed for non-compliance with sect. 15 (*k*).

Publication of rates for goods.  
R. R. Act, 1873, s. 14.

The publication of rates for goods is provided for by the 14th section of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), as follows:—

"Every railway company and canal company shall keep at each of their stations and wharves a book or books showing every rate (*l*) for the time being charged for the carriage of traffic (*m*), other than passengers and their luggage, from that station and wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding or place to which any such rate is charged. Every such book shall, during all reasonable hours, be open to the inspection of any person without the payment of any fee."

The section proceeds to enact that, any company failing to comply with it is to be liable to a penalty of 5*l.* a day, recoverable before

(*g*) *Brown v. G. W. R. Co.*, L. R., 9 Q. B. D. 744; 51 L. J., Q. B. 529. This case was affirmed by the Court of Appeal upon the construction of the Great Western Act, 5 & 6 W. 4, c. cvii. s. 108, which, containing as it does the words "rates or tolls for articles or passengers conveyed," is even more against the company than s. 95 of the Railways Clauses Act.

(*h*) *Scottish North Eastern R. Co. v. Anderson*, 1 Scss. Ca., 3d Series, 1058 (A.D. 1863). See also *Highland R. Co. v. Jackson*, 3 Scss. Ca., 1th Ser., 581.

(*i*) In the Report of the Royal Com-

mission, 1867, p. 1, it is said that "from the context of the Act [of 1845] it would appear that Parliament intended all charges actually made to be exhibited."

(*k*) The remedy for non-compliance would seem to be under 7 & 8 Vict. c. 85, s. 17, vol. II.

(*l*) Including all through rates, from the particular station, but no rates of any kind from any other station, *Oxleale v. N. E. R. Co.*, 3 Nev. & Mac. 35.

(*m*) This includes trucks, &c., as well as goods and animals. See sect. 3 of the act (the interpretation clause).

justices. Notwithstanding that this specific remedy is provided, it seems that the Railway and Canal Commission have jurisdiction, under sect. 6 of the same act, to entertain any complaint made of the contravention of sect. 14. The Railway Commissioners have so decided (*n*).

Jurisdiction of Railway Commissioners to enforce publication.

*Perkins v. L. & N. W. R. Co.*

The Commissioners have held, too, that a coal siding is a station within the meaning of sect. 14, and that a railway company is bound to keep books of rates for the conveyance of coals therefrom, either at the siding or at the station "where persons interested in knowing the charges for coal might be expected to go in order to obtain the information sought" (*o*). The words of the section; "to which they book," mean "to which they quote a rate," and the obligation to keep rates at the station from which they are charged attaches equally whether the actual booking is done there or somewhere else. This was held by the Commissioners in *Jones v. North Eastern R. Co.* (*p*), in which case the company had formed all their stations into three groups, and kept their mineral rates for the whole of each group at one principal station only.

Publication of rates at coal siding.

The right to inspect the rate book is general, and it is immaterial what motive or object the party has in desiring inspection, and the Commissioners have, as ancillary to inspection, granted the right of taking extracts or copies from the rate book (*q*).

Right to inspect rate book is general.

The subject of "terminal" charges and of their distinguishment from rates for carriage is dealt with in chapter XVI., sect. 3.

"Terminala.

The following extract from the Report of the Amalgamation Committee of 1872, shows the policy of the Legislature in passing section 14 of the Railways Regulation Act, 1873:—

Policy of enforcing publication of rates.

"The rates in the case of all the great companies are numbered by millions, and, as the practice of through rates and through booking extends, are likely to increase still further. In addition to this, they are constantly varying with the varying circumstances of trade and of railway policy. The case of the public against the railway companies is a very strong one. They are monopolists, who are unlimited in their charges for carriage, except by the parliamentary maximum, and who are restricted by no definite limit whatever as regards terminal charges; these two charges they mix up together, and, under the present system, they do not separate them. They are practically under no restriction, except that of their own interest, which may not be

(*n*) *Perkins v. L. & N. W. R. Co.* 1, Nev. & Mac. 327, decided on the authority of *Cory v. Yarmouth and Norwich R. Co.*, 3 Railw. Cas. 524.

(*o*) *Harborne R. Co. v. L. & N. W. R. Co.*, 2 Nev. & Mac. 189. See also *Jones v. N. E. R. Co.*, 2 Nev. & Mac. 208.

(*p*) 2 Nev. & Mac. 208.

(*q*) *Perkins v. L. & N. W. R. Co.*, ubi supra. It appears that "the Commissioners, who directed visits to be made to various

stations to discover whether the provisions of sect. 14 were complied with, found that in many instances they were not, and communicated with the Board of Trade as to those companies most in default, in case the Board might think fit to cause an application to be made to the Commissioners under sect. 6 of the Act of 1873," for an injunction enjoining compliance with the section. See 1st Report of Commissioners, p. 8.

4. Power to take  
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the same as that of the public; they claim and exercise the right to vary their charges to any extent they please, within the parliamentary maximum; to favour one place or one description of trade at the expense of another; to charge high rates for short distances, and low rates for long distances; or to charge two different rates for the same service, if they think it to their interest to do so; and not only do they claim to exercise all these powers, but they refuse to tell the public how they exercise them, or why they exercise them. . . . If the companies are dealing fairly, it is to their interest to court observation and criticism, and to give the public all possible information about their charges, and their reasons for making them; and there appears to be no reason why they should not freely give to every trader making inquiry the same knowledge or information which they must necessarily give to every clerk or station-master who is empowered to charge rates; or why they should not frame a scale distinguishing between terminal charges and mileage; or why, lastly, they should not be bound to furnish in writing, on the application of the Board of Trade, or of some competent authority, such as the Commission referred to below, their reasons for making any charge which is complained of, either as being exceptionally high or exceptionally low, or otherwise unfair, either to the person or class of persons paying it, or to any other persons, or to any particular place or trade."

Right to sell in  
default of pay-  
ment.

R. C. Act, s. 97.

"Toll,"

Confinement of  
right to toll for  
use of railway.

Empties.

Tolls are payable to such persons, at such places, and in such manner, as the company shall appoint: (Sect. 96.) In default of payment of tolls for carriages or goods, the company may detain and sell such carriages and goods, or, if removed, any other carriages or goods on their premises belonging to the defaulter, and pay themselves; or tolls may be recovered by action at law: (Sect. 97.) Notwithstanding the definition of toll in the interpretation clause (sect. 3) as including "any rate or charge for any passenger, animal, carriage, goods," &c., "conveyed on the railway," it has been held by the Court of Exchequer that this 97th section applies only to tolls for the use of the railway, and not to the charges made by a company as carriers. The decision seems to have proceeded on the ground that the 95th and 96th sections "related evidently" to tolls ~~for the~~ use of the railway only (r), and this has no doubt been held (s); but the correctness of the decision restricting the meaning of s. 97 has been questioned in a Scotch case (t). The 97th section has also been held not applicable to a sum claimed for return of "empties," and where a railway company entitled to distrain for tolls demanded a sum in gross made up of two sums, one due for tolls, the other not so due, and the party tendered the amount due for tolls as being all that was due; it was held that the company were not entitled to *distrain*, but were not precluded by the tender from recovering the toll (u); but it has been held applicable to a charge for the use of

(r) *Wallis v. L. & S. W. R. Co.*, 39 L. J., Ex. 57; L. R., 5 Ex. 62.

(s) See *Brown v. G. W. R. Co.*, L. R. 9 Q. B. D. 744, and p. 451, ante.

(t) *Cheltenham R. Co. v. Guild*, 1 Sess. Ca., 4th Series, 198.

(u) *Field v. Newport, &c. R. Co.*, 27 L. J., Ex. 396.

the line and of locomotive power combined (x). The section does not authorize detention and sale of carriages for tolls due in respect of goods carried on them (y). The owner of carriages or goods must deliver to the collector of tolls an exact account, in writing, signed by him, of the number and quantity of goods, &c., conveyed, and of the place whence they came and whither they are going: (Sect. 98); and if any person fails to give such account, or gives a false account, or unloads goods with intent to avoid payment of tolls, he is liable to a penalty in addition to the tolls: (Sect. 99.) Disputes concerning the amount of the tolls may be settled by a justice, and the company may detain the goods meanwhile: (Sect. 100.) If any difference arises between the toll collector and the owner or person in charge of any carriage passing or being on the railway, or of any goods conveyed by such carriage respecting the weight, quantity, quality, or nature of the goods conveyed, the company may detain the carriage or goods, and examine the same; and if, upon examination, the goods appear to be of greater weight, &c., the party giving a false account is liable to pay the costs of examination; but if the result be otherwise, the company are liable to pay such costs, and also damages for the detention of the goods: (Sect. 101.) If it appears to a justice, that such examination and detention were without reasonable ground, or vexatious, then the collector is liable personally to pay the costs and damages, and the justice may issue a warrant for the recovery of the same: (Sect. 102.) If a passenger endeavours to defraud the company of his fare\* (z), he is liable to be fined, and may be apprehended and detained until he can conveniently be taken before a justice: (Sects. 103, 104.)

The power to charge tolls is to be found in the Consolidation Act as well as in the special act, but the amount of the tolls is to be gathered from the special acts only. These amounts will be found to vary according to the expense of the line, the date of its construction, the opposition to which the bill was subjected, and the discretion of the parliamentary committee to which it was submitted. But although both the amounts and the classifications of goods chargeable vary very much, the form of the toll clauses (at any rate since the Railways Clauses Act of 1845) exhibits a considerable similarity. The tolls are divided into four branches. There is a separate toll for the use of the railway, another separate toll for the use of the railway in a carriage provided by the company, another separate toll for the use of locomotive power, and finally, an aggregate maximum "rate of charge" for the use of all together.

Account of  
loading, s. 98.

Disputes as to  
tolls may be  
settled by a  
justice.  
R. C. Act, s. 100.

Toll collector  
liable for  
wrongful de-  
tention of  
goods, &c.

Frauds by pas-  
sengers.  
\* See p. 519.

Toll clauses of  
the special acts.

(x) *North Central Wagon Co. v. Manchester, Sheffield, and Lincolnshire R. Co.*, L. R. 32 Ch. D. 477; 55 L. J., Ch. 780.

(y) *North Central Wagon Co. v. Man-*

*chester, Sheffield, and Lincolnshire R. Co.*, L. R. 35 Ch. D. 191; 50 L. J., Ch. 809; 35 W. R. 417.—C.A.

(z) See *R. v. Price*, 4 K. & B. 598.



4. *Power to take Tolls.*

Sample toll clauses.

L. B. & S. C.  
R. Co.

Repeal of former toll clauses.

The following are the toll clauses of the London, Brighton and South Coast Railway Company's Act of 1863 (a), 26 & 27 Vict. c. cccviii:—

"47. All clauses and provisions authorizing the company to levy tolls, rates or charges on any railways or tramways belonging to them contained in any acts passed with reference to the company, and in force immediately before the passing of this act, are hereby repealed, but such repeal shall not release, discharge, prejudice or defeat any tolls, rates, charges or sums of money due to the company at the passing of this act under or by virtue of those clauses or provisions, or the right of the company to, or their remedies for the recovery of, any such tolls, rates or charges, and the same may be claimed and recovered as if this act were not passed.

Tolls for use of railway.

"48. The company may demand and take for the use of their railways (and which term 'their railways' in this act includes the railways by this act authorized) and for the supply of carriages, waggons or trucks, any toll not exceeding the following (that is to say):—

Passengers.

"First. In respect of passengers conveyed upon their railways, or any part thereof, as follows:—

For every person, 2d. per mile;

And if conveyed in or upon a carriage provided by the company, an additional sum of  $\frac{1}{2}$ d. per mile:

Animals.

"Secondly. In respect of animals conveyed upon their railways, or any part thereof, as follows:—

1. Horse.

Class 1. For every horse, mule or other beast of draught or burden, 3d. per mile;

And if conveyed in or upon a carriage provided by the company, an additional sum of 1d. per mile:

2. Ox.

Class 2. For every ox, cow, bull or neat cattle,  $1\frac{1}{2}$ d. per head per mile;

And if conveyed in or upon a carriage provided by the company, an additional sum of  $\frac{1}{2}$ d. per mile:

3. Small animals, except sheep.

Class 3. For every calf, pig and other small animal (except sheep and lambs),  $\frac{1}{2}$ d. per mile;

And if conveyed in or upon a carriage provided by the company, an additional sum of  $\frac{1}{2}$ d. per mile:

4. Sheep.

Class 4. For sheep and lambs, 4d. per score per mile, and so in proportion for any number greater or less than a score:

"Thirdly. In respect of goods and other things conveyed upon their railways, or any part thereof, as follows:—

Tonnage on articles of merchandise.

Class 5. For all alkali, alum, bark, bricks, bones for manure, brooms and handles, bran, bullets, cannon, cement, chalk, clay, coal, coke, compost, cement, culm, dung, fireclay, flint, flour, fullers' earth, grain, guano, iron ore, ironstone, lead, lime, limestone, manure of all sorts, metallurgy for road repairs, nitrate of soda, oil cakes in casks or bags, pig iron, potatoes, pollard, sand, salt for manure, slates, spelter, stones for paving or building, tiles, per ton per mile  $1\frac{1}{2}$ d.;

And if conveyed in a carriage provided by the company, an additional sum per ton per mile of  $\frac{1}{2}$ d.:

6. Ale in casks, eggs, salt, sugar, wool, &c.  $1\frac{1}{2}$ d.

Class 6. For all ale and porter in casks, bacon, butter in casks, charcoal, cider, dyewoods, eggs, earthenware, gas and water pipes, hair, hemp, hides, hop poles, hops, hoofs, iron rod, hoop, bar, or plate, undamageable iron castings, lard, lead (white or red), marble in blocks, malt, meal, molasses, nails, paints, pitch and tar, rags, resin, rice, salt, saltpetre, seed, soap, soda, spirits and wine in casks, steel, rough or cast, sugar raw, sulphur, tallow, timber, staves and deals, tin, vices, chains and anvils, vinegar, whiting, wool, per ton per mile,  $1\frac{1}{2}$ d.;

And if conveyed in a carriage provided by the company, an additional sum per ton per mile of  $\frac{1}{2}$ d.:

7. Ale in bottles, groceries, salt fish, &amp;c. 2d.

Class 7. For all ale and beer in bottles, canvas, cordage, flax, floorcloth, fruit dried, fish salted, groceries, hay, hardware, herrings dried, leather, damage-

(a) The maximum rate for passengers were slightly raised by a subsequent act passed in 1868. See post, p. 457, note (b).

able iron castings, light machinery, mats, mineral waters, oil in casks, oil cakes (loose), paper, rope, snuff, spirits and wine in bottles, stationery, tow, turpentine, varnish, veneers, per ton per mile, *2d.* ;

L. B. & S. C.  
R. Co.

And if conveyed in a carriage provided by the company, an additional sum per ton per mile of  $\frac{1}{2}d.$  :

Class 8. For agricultural implements, books, bonnets, butter fresh, carboys, china, cork, drapery, drugs, fish fresh, fruit fresh, furniture, glass, haberdashery, hats, harps, hosiery, joiners' work, millinery, linens, luggage, musical instruments, meat, oil in jars, pianos, pictures, poultry alive, poultry dead, silks, sugar refined, tinned ware, wearing apparel, and all other merchandise, articles, matters or things, except such as are included in the above classes, per ton per mile *3d.* :

8. Agricultural implements, glass, silks, and things not classed.

And if conveyed in a carriage provided by the company an additional sum per ton per mile of  $\frac{1}{2}d.$  :

For every carriage of whatever description, not being a carriage adapted for travelling on a railway, and not weighing more than one ton, conveyed on a truck or platform belonging to the company, *6d.* per mile.

And a like sum of *1d.* for every additional quarter of a ton, or fractional part of a quarter of a ton, which any such carriage may weigh.

"49. The company may demand for the use of engines for drawing or propelling carriages on their railways any sum not exceeding *1d.* per mile for each passenger or animal, or for each ton of goods or other articles.

Tolls for engines, *1d.*

"50. The maximum rates of charge to be made by the company for the conveyance of passengers along their railways, including the tolls for the use of the railways and of carriages and for locomotive power, and every other expense incidental to such conveyance (except government duty), shall not exceed the following sums ; (that is to say,)

Maximum rates for passengers.

For every passenger conveyed in a first-class carriage by an express or fast train, *twopence halfpenny (b)* per mile :

For every passenger conveyed in a second-class carriage by an express or fast train, *twopence (c)* per mile :

For every passenger conveyed in a first-class carriage by an ordinary train, *twopence (d)* per mile :

Government duty excepted.

For every passenger conveyed in a second-class carriage by an ordinary train, *one penny halfpenny (e)* per mile :

For every passenger conveyed in a third-class carriage, *one penny* per mile.

"51. The maximum rates of charges to be made by the company for the conveyance of animals and goods, including the tolls for the use of their railways and waggons or trucks and for locomotive power, and every other expense incidental to such conveyance (except a reasonable sum for loading, covering, and unloading of goods at any terminal station of such goods, and for delivery and collection, and any other services incidental to the duty or business of a carrier (*f*), where such services or any of them are or is performed by the company), shall not exceed the following sums ; (that is to say,)

Maximum rates for animals and goods.

For every animal in Class 1, *4d.* per mile :

For every animal in Class 2, *1½d.* per mile :

For every animal in Class 3, *¾d.* per mile :

For animals in Class 4, *4d.* per score per mile (and so in proportion for any greater or less number) :

For everything in Class 5, *1½d.* per ton per mile :

For everything in Class 6, *2d.* per ton per mile :

For everything in Class 7, *3d.* per ton per mile :

For everything in Class 8, *4d.* per ton per mile :

"Terminals."

And for every carriage of whatever description, not being a carriage adapted and used for travelling on a railway, and not weighing more than one ton, carried or conveyed on a truck or platform, per mile, *7d.*

"52. The following provisions and regulations shall be applicable to the fixing of such tolls and charges ; (that is to say,)

Short distances fractions and weight.

(b) Now *2½d.* by the London, Brighton and South Coast Railway Act, 1868, § 31 & 32 Vict. c. cxxxiv. s. 28.

(c) Now *2½d.* ib.

(d) Now *2½d.* ib.

(e) Now *1½d.* ib.

(f) See *Hall v. L. B. & S. C. R. Co.*, L. R. 15 Q. B. D. 505, and post, ch. xvi. s. 3.

4. <i>Power to take Tolls.</i>	For goods, articles, animals or persons conveyed on their railways for a less distance than six miles, the company may demand tolls and charges as for six miles (g).
L. B. & S. C. R. Co.	For a fraction of a mile beyond six miles, or beyond any greater number of miles, the company may demand tolls on animals and merchandise for such fraction in proportion to the numbers of quarters of a mile contained therein, and if there be a fraction of a quarter of a mile such fraction shall be deemed a quarter of a mile; and in respect of passengers, every fraction of a mile beyond six miles, or beyond any greater number of miles, shall be deemed a mile (h).
Stone and timber.	For a fraction of a ton the company may demand toll according to the number of quarters of a ton in such fraction, and if there be a fraction of a quarter of a ton such fraction shall be deemed a quarter of a ton : With respect to all articles, except stone and timber, the weight shall be determined according to the usual avoirdupois weight : With respect to stone and timber, fourteen cubic feet of stone, forty cubic feet of oak, mahogany, teak, beech or ash, and fifty cubic feet of any other timber, shall be deemed one ton, and so in proportion for any smaller quantity :
"Terminal station."	No station is to be considered a terminal station in regard to any goods conveyed on the railways of the company unless such goods have been received thereat direct from the consignor of such traffic, or are directed to be delivered thereat to the consignee.
Small parcels.	"63. With respect to small packages and single articles of great weight, notwithstanding the rates of tolls prescribed by this act, the company may lawfully demand the tolls following; (that is to say,) For the carriage on their railways, or any part thereof, of any parcel not exceeding seven pounds in weight, 4 <i>d.</i> : For the carriage of any parcel exceeding seven pounds but not exceeding fourteen pounds in weight, 6 <i>d.</i> : For the carriage of any parcel exceeding fourteen pounds but not exceeding twenty-eight pounds in weight, 9 <i>d.</i> : For the carriage of any parcel exceeding twenty-eight pounds but not exceeding sixty-six pounds in weight, 1 <i>s.</i> : And for the carriage of any parcel exceeding fifty-six pounds but not exceeding five hundredweight, the company may demand any sum which they think fit :
Single articles of great weight.	Provided always, that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages : For the carriage of any one boiler, cylinder, or single piece of machinery, or single piece of timber or stone, or other single article, the weight of which including the carriage shall exceed four tons but shall not exceed eight tons, the company may demand such sum as they think fit, not exceeding 6 <i>d.</i> per ton per mile ; For the carriage of any single piece of timber, stone, machinery, or other single article, the weight of which with the carriage shall exceed eight tons, the company may demand such sum as they think fit.
Passenger's luggage.	"61. Every passenger travelling upon the railways of the company may take with him his ordinary luggage, not exceeding one hundred and twenty pounds in weight for first-class passengers, one hundred pounds in weight for second-class passengers, and sixty pounds in weight for third-class passengers, without any charge being made for the carriage thereof.

(g) See *Lancashire and Yorkshire R. Co. v. Hedderley* (No. 1), 42 L. J. Ex. 129, in which this clause, although it applied in terms to carriage partly on the line of the company and partly on any line which they had a right to use, was held by the House of Lords to be inapplicable.

(h) A clause similar to this second paragraph (in an act in which the first paragraph did not occur) empowering a company

to charge for a fraction of a mile beyond four miles was held to empower the company to charge for fractions within the four miles, but both the Court of Appeal and the House of Lords were equally divided on the point: *Pryce v. Monmouthshire Canal & R. Co.*, 11 R. 4 App. Cas. 197; 49 L. J. Ex. 130; 40 L. T. 630; 27 W. R. 666.

"55. Provided always, that nothing herein contained shall be held to prevent the company from taking any increased charge, over and above the charges hereinbefore limited, for the conveyance of goods of any description, by agreement with the owners of or persons in charge of such goods, either in respect of the conveyance thereof (except small parcels) by passenger trains, or by reason of any other special service performed by the company in relation thereto.

Company may take increased charges by agreement.

"56. Provided also, that the restriction as to the charges to be made for passengers shall not extend to any special train that may be required upon the railways of the company, but shall apply only to the ordinary and express trains appointed or to be appointed from time to time by the company for the conveyance of passengers and goods upon their railways" (i).

Restriction as to charges not to apply to special trains.

The majority of the special acts, both of ancient and modern date, will be found to contain toll clauses divisible, as above, into the four branches of—(1) use of railway, (2) use of railway in company's carriages, (3) use of engines, and (4) use of all three. Exceptions (k) are afforded by the Metropolitan District Railway Act, 1875, and by a Midland Railway Act of 1846 (9 & 10 Vict. c. cccxxvi). By a Standing Order of the House of Lords (No. 90), "no bill by which the maximum rates authorized for the conveyance of passengers, goods or animals shall or may be increased, shall be read a second time until a report from the Board of Trade has been laid upon the table of the House."

Tolls may not be altered without report from Board of Trade.

It has been said that the rates of charges on English railways are practically unlimited, inasmuch as the companies are in every instance left at liberty to charge as high a rate on every part of their traffic as they have ever thought or are ever likely to think for their own advantage, and that "the maximum is always so high as to exceed the limit which self-interest alone would dictate" (l). It may be stated, however, that two important relaxations made generally by railway companies—the grant of return tickets at less than double fares, and the grant of children's tickets at half-fares—have not been suggested by the special acts, which make no mention of them. As far as the statutes are concerned, these relaxations might be discontinued at any time, unless, indeed, the restriction of "reasonableness" imposed by sect. 86 of the Railways Clauses Act, 1845 (m) might be construed to apply to them. However that may be, the following table, extracted from Mr. Bigg's valuable collection of Special Acts, 1845,

(i) This section, and the 54th and 55th sections, follow common forms, employed in most special acts passed within the last thirty years with little variation, except as to the weight of luggage allowed.

(k) A noteworthy exception was formerly afforded by the original Great Northern Act of 1846, 9 & 10 Vict. c. lxxi. The toll clauses of that act provided (inter alia) that the company might charge a separate sum for each parcel, although many were included in one package (sect. 205):

and that tolls should be charged according to the direct distance as measured upon the Ordnance Map (sect. 207). But all the toll clauses of the Act of 1846 (which might advantageously be studied as model clauses) were repealed by 18 & 14 Vict. c. lxi.

(l) Bigg's Special Acts, 1845, citing passages from reports of Mr. Laing, and from a pamphlet of Mr. Morrison, M.P.

(m) See and consider the remarks upon this important section at p. 447, ante.

p. xxvii., shows the variation in the maximum charges authorized by the Special Acts passed in 1845 :—

	Lowest Maximum Charge.	Highest Maximum Charge.
ANIMALS, per mile,	<i>d.</i>	<i>d.</i>
Horses .....	3	6
Sheep .....	0½	2½
Carriages .....	4	10
GOODS, per ton, per mile,		
Coals .....	1	½
Corn .....	1½	6
General Merchandise .....	2½	6
PASSENGERS, per mile,		
First Class .....	2	4
Second Class .....	1½	3
Third Class .....	1	2

The following table shows the present (1888) maximum charges for the use of the railway and of carriages, and of locomotive power, authorized by the *principal* special act of the company named at the head of each column :—

	(t. N. R. 1850. (13 & 14 Vict. c. 61, s. 13.)	G. W. R. 1847. (10 & 11 Vict. c. 226, s. 49.)	L. & N. W. R. 1846. (9 & 10 Vict. c. 204, s. 63.)	L. C. & D. R. 1853. (16 & 17 Vict. c. 132, s. 56.)	S. E. R. 1846. (8 Will. IV. c. 75, s. 120.)	Midland. 1846. (9 & 10 Vict. c. 326, ss. 59, 63.)	G. E. R. 1862. (25 & 26 Vict. c. 223, s. 220.)
	<i>a.</i>	<i>b.</i>	<i>c.</i>	<i>d.</i>	<i>e.</i>	<i>f.</i>	<i>g.</i>
PASSENGERS, per mile,	<i>d.</i>	<i>d.</i>	<i>d.</i>	<i>d.</i>	<i>d.</i>	<i>d.</i>	<i>d.</i>
Express .....	3	{ 1st Cl. 2½ 2nd „ 1½ }	2½	—	{ 3½ }	See <i>f.</i>	—
1st Class .....	2	2	2	3	3½	3	3
2nd Class .....	1½	1½	1½	2	2	2	2
3rd Class .....	1	1	1	1	1	1	1½
ANIMALS, per mile,							
Horse .....	3	3	3	5	1½	5	4
Ox .....	2	1½	2	2	1½	3	2
Sheep .....	0½	0½	0½	0½	0½	1	0½
					See <i>e.</i>		

- Repealing toll clauses of previous acts ; Increasing charges fixed by Act of 1846. Government duty is excepted. The company is compellable to run third-class carriages every day as often and on such conditions as the Board of Trade may prescribe.
- Reducing charges fixed by previous acts. Government duty is excepted. See also 18 & 19 Vict. c. 98, s. 92 (South Wales), and 26 & 27 Vict. c. 198, ss. 6, 6½ (West Midland and South Wales Amalgamation). By s. 64 of the latter act the tolls may be revised by the Board of Trade on a 6 per cent. dividend being paid.
- Government duty is excepted.
- The East Kent Railway Act, 1853. By 22 & 23 Vict. c. 54, the name of the East Kent Railway Company was changed to London, Chatham and Dover Railway Company.
- In the case of animals and goods, such additional sum as the company think proper for use of engines, and such additional sum as shall be reasonable for the use of carriages.
- The Birmingham and Bristol and Midland Railway Act, 1846. Government duty is excepted. By sect. 58, a reasonable additional sum appears to be chargeable for the use of engines and carriages for express trains.
- The Great Eastern Amalgamation Act, 1862, repealing toll clauses of former acts. By sect. 237 (see p. 449, ante), tolls on certain portions of the line are to be charged according to geographical distance.

With regard to goods, the following table, extracted from the Report of the Royal Commission, 1867, will give an example of the maximum rates authorized by the *principal* acts of the several companies named :—

Per Ton per Mile.	L. & S. W. R.	G. E. R.	G. W. R.	G. N. R.	L. & N. W. R.	Midland.
	<i>d.</i>	<i>d.</i> <i>d.</i>	<i>d.</i> <i>d.</i>	<i>d.</i> <i>d.</i>	<i>d.</i> <i>d.</i>	<i>d.</i> <i>d.</i>
Dung, lime, bricks, coal, pig-iron, iron ore .....	2	1½ to 1½	¾ to 2	¾ to 1½	¾ to 1½	1 to 2
Sugar, corn, earthenware, timber, iron castings, sheet and wrought iron, damageable iron .....	3	2 to 2½	2 to 3	1½ to 2½	1½ to 2½	2 to 2½
Cotton and other wools, drugs, manufactured goods .....	3	2 to 2½	2½ to 4	2½ to 3	2½ to 3	3 to 4
Fish, feathers, household furniture, clothing, silk .....	5	4	3 to 4	3 to 3½	3 to 3½	3 to 4

The above tables, as has been already indicated, do not apply over all the railways worked by a particular company, but only such principal part of them as is regulated by the principal special act of any particular company. Complete and elaborate tables of the "maximum rates of charges which the railway companies of the United Kingdom are authorized to make for the conveyance of passengers, animals, and goods on railways" were, during the sitting of a "Railway Rates Committee" of the House of Commons, presented to that House in a Parliamentary Paper of 1881.

The variations in the amounts, as exhibited by the above tables, are obvious. But the classification of goods in the various clauses of the special acts exhibits a still greater variety. The Report of the Royal Commission of 1867 contains the following passage on this subject :—

Imperfect classification of goods in special acts.

—“The clauses governing tolls and charges, which have been left entirely to the special acts, are of a very bald and imperfect character, and are by no means uniform.

“There is not only a diversity in the amount of tolls for the use of the line and in the rates when the company is a carrier, but an imperfect enumeration, and often a diversity of classification of the various goods to which the tolls apply. Thus some important commodities are altogether omitted, and the class in which a particular article is placed in the act of one company is not always the same as that in which the same article is placed in the act of another company.

“In some cases, Parliament has taken advantage of the amalgamation of companies to bring all their powers as to rates and tolls into the Amalgamation Act; this has been done, for instance, in the case of the Leicestershire and Yorkshire Railway, and to some extent in the case of the London and North Western Railway, whilst in other cases the toll clauses are scattered through the numerous separate acts originally obtained by the companies which have since been amalgamated.

4. *Power to take  
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Midland R. Co.

"For instance, the Midland Railway Company has its power of levying tolls divided over three acts. In one act coals are classed in the lowest class, with a maximum toll of 1*d.* per ton per mile; in another act they are classed in the second class, with a toll of 1½*d.* In one act grain is classed in the lowest class but one, with a toll of 1½*d.*; in the two other acts it is placed in the next class but one, with a maximum toll of 2*d.*

"In the Midland Railway Acts generally there are four classes for merchandise and minerals, in the Lancashire and Yorkshire there would appear to be eight, in the North Eastern five, and in the London and South Western three.

L. & N. W. R. Co.

"The London and North Western Railway Company appear to derive their powers from five acts, in some of which the articles are placed in eight classes, in others in three or four classes.

G. E. R. Co.

"The Great Eastern Railway Company has five acts, in some of which the articles are placed in five classes, in others in four classes.

G. N. R. Co.

"The Great Northern Railway would appear to have its powers for levying tolls and rates contained in nine separate acts, in some of which the articles are placed in five classes, in others in four classes.

G. W. R. Co.

"The Great Western would appear to have thirteen acts with tolls and rate clauses. In one act the maximum toll for rod and pig iron and iron ore is ¾*d.* per ton per mile; in another these articles are placed in another class, with a toll of 1½*d.* In one act grain is placed in the lowest class but one, with a maximum toll of 1*d.*; in another act it is placed in a class above, with a maximum toll of 2*d.*; and in a third act the maximum toll is 2¾*d.* In one act the articles are divided into eight or nine classes, in others into four classes.

"These instances will afford a sufficient example of the nature of the anomalies in the classification of goods and in tolls and rates.

"The enumeration is, moreover, extremely imperfect. One act enumerates 22 articles, another 98, another 160; the acts adding at the end of the highest class general words to include all other articles and matters not enumerated in the previous classes."

(Clearing house  
classification  
should be made  
statutory.

It is not to be wondered at, therefore, that the Royal Commission recommended that, "when railway companies apply to Parliament for power to amend their acts, advantage should be taken of the application to require them to consolidate all the clauses of existing acts which remain permanently applicable to their undertaking;" that "the Clearing House classification should be made the basis of the classification adopted by acts of Parliament, and the enumeration and classification should be stated at length in a general act;" and that "existing railway companies, in whose acts of Parliament the classification is essentially different from the Clearing House classification, should apply for short acts of Parliament to arrange their existing maximum tolls as nearly as possible to meet the new classification." The Joint select Committee on Amalgamation of 1872 reported to the same effect (*n*), pointing out that the Clearing House "classification is important to the public, first, because it shows that railway managers can, when it is their own interest to do so, make one

classification for all railways, not only uniform, but much more complete and satisfactory than the various classifications in their several acts, and because, if such a classification were generally adopted, it would be a great step towards publication and general knowledge of the actual rates; and, in the second place, because the present loose and imperfect classification of rates in the special acts leaves it in the power of the companies arbitrarily to place in one class or another, or to remove from class to class, the many unenumerated goods."

The Railway Rates Committee of 1881, after observing that the existing classification was very imperfect, and that they had failed to discover any general principle on which maximum rates have been fixed, were of opinion that "the multiplicity of special acts dealing with rates or charges on the same railway is a great evil, and that railway companies should be required to consolidate their special acts, in so far as they affect rates or charges imposed upon the traders," and that "one classification of goods should be adopted over the whole railway system."

In the session of 1883, the London and North Western, Midland, and many other railway companies introduced bills revising and consolidating their maximum rates clauses so far as applicable to goods, but these bills were not so much as read a second time.

Attempted revision in 1883.

The Legislature has at length interfered, and in sect. 24 of the Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, has set on foot an elaborate procedure for bringing about revised classifications of merchandise traffic (*i.e.*, traffic in goods and animals), and revised lists of maximum rates and charges applicable thereto, on the initiative of the companies, and under the combined control of the Board of Trade and Parliament, after ample time for full consideration, by both the Board and Parliament, of all questions raised by all persons or companies interested.

The impending revisions under the Railway and Canal Traffic Act, 1888.

The first two of the thirteen sub-sections of the 24th section are as follows:—

(1) "Notwithstanding any provision in any general or special act, every railway company shall submit to the Board of Trade a revised classification of merchandise traffic (*a*), and a revised schedule of maximum rates and charges applicable thereto, proposed to be charged by such railway company, and shall fully state in such classification and schedule the nature and amount of all terminal charges (*b*) proposed to be authorized in respect of each class of traffic, and the circumstances under which such terminal charges are proposed to be made. In the determination of the terminal charges of any railway company, regard shall be had only to the expenditure reasonably necessary to provide the accommodation in respect of which such charges are made, irrespective of the outlay which may have been actually incurred by the railway company in providing that accommodation.

(a) By s. 53, "merchandise traffic" includes "traffic in goods, cattle, live stock, and animals of all descriptions."

(b) By s. 55, "terminal charges" in-

clude "charges in respect of stations, sidings, wharves, depôts, warehouses, cranes, and other similar matters, and of any services rendered thereat."





but regulated by a separate clause in each act, is, it is conceived, beyond the scope of the section; but the point is doubtful.

Next we come to three sub-sections, which provide for the settlement, *by agreement*, between the Board of Trade (after hearing objections) and the companies, of the new classifications and schedules, as follows:—

Settlement of classification, &c., by agreement.

(3) "The Board of Trade shall consider the classification and schedule, and any objections thereto, which may be lodged with them on or before the prescribed time, and in the prescribed manner (r), and shall communicate with the railway company and the persons (if any) who have lodged objections, for the purpose of arranging the differences which may have arisen.

Consideration by Board of Trade.

(4) "If after hearing all parties whom the Board of Trade consider to be entitled to be heard before them respecting the classification and schedule, the Board of Trade come to an agreement with the railway company as to the classification and schedule, they shall embody the agreed classification and schedule in a Provisional Order, and shall make a report thereon to be submitted to Parliament, containing such observations as they think fit in relation to the agreed classification and schedule.

Provisional order.

(5) "When any agreed classification and schedule have been embodied in a Provisional Order, the Board of Trade, as soon as they conveniently can after the making of the Provisional Order (*of which the railway company shall be deemed the promoters*), shall procure a bill to be introduced into either House of Parliament for an act to confirm the Provisional Order, which shall be set out at length in the schedule to the bill."

Bill.

Thus far the section has dealt with revision by agreement. The two next sub-sections attempt to make provision for the case of no agreement being come to, by empowering the Board of Trade to bring a classification, &c., of their own before Parliament, and in the last resort to enforce such classification upon a company by means of Provisional Order and bill. The two sub-sections are as follows:—

Determination of classification by Board of Trade.

(6) "In any case in which a railway company fails within the time mentioned in this section to submit a classification and schedule to the Board of Trade, and also in every case in which a railway company has submitted to the Board of Trade a classification and schedule, and after hearing all parties whom the Board of Trade consider to be entitled to be heard before them, the Board of Trade are unable to come to an agreement with the railway company as to the railway company's classification and schedule, the Board of Trade shall determine the classification of traffic which, in the opinion of the Board of Trade, ought to be adopted by the railway company, and the schedule of maximum rates and charges, including all terminal charges proposed to be authorized applicable to such classification which would, in the opinion of the Board of Trade, be just and reasonable, and shall make a report, to be submitted to Parliament, containing such observations as they may think fit in relation to the said classification and schedule, and calling attention to the points therein on which differences which have arisen have not been arranged.

(7) "After the commencement of the session of Parliament next after that in which the said report of the Board of Trade has been submitted to Parliament, the railway company may apply to the Board of Trade to submit to Parliament the question of the classification and schedule which ought to be adopted by the railway company, and the Board of Trade shall on such application, and in any case may, embody in a Provisional Order such classification and schedule as in the opinion of the Board of Trade ought to be adopted by the railway company, and procure a bill to be introduced into either House of Parliament for an act to confirm the Provisional Order, which shall be set out at length in the schedule to the bill."

(r) That is as prescribed by Board of Trade Rules under s. 35, p. 466, post.

4. *Power to take Tolls.*

Effect of remaining sub-sections of s. 24.

For the six remaining sub-sections reference must be had to p. 697, where the 24th section is printed at length. It may be mentioned here that by sub-sect. 8, petitions against any bill to confirm a Provisional Order are to be referred to a Select Committee (of the two Houses if so ordered), that by sub-sect. 9 the Board of Trade may employ and pay skilled persons in preparing the classifications, that by sect. 10 any act confirming a Provisional Order is to be a public general act, that by sub-sect. 11 classifications may be amended on application of the companies, and that by sub-sects. 12 and 13 remuneration payable to the companies for mails or War Office stores is excepted from the operation of the section.

Board of Trade Rules.

The 35th section of the act empowers the Board of Trade to make rules as to the "form and manner" of the classifications and other matters. A comparison of the forms scheduled to these rules (post, p. 704) with the existing maximum rates clauses (see *e.g.*, ante, p. 457), will show that they introduce, in addition to the ordinary rates per ton per mile, the novelties of graduation of rates by distance and quantity.

5. *The Equality Clause of the R. C. Act, 1845.*

R. C. Act, s. 90.

5. *The Equality Clause of the Railways Clauses Act, 1845.*

The proviso of the 90th section of the Railways Clauses Act brought generally into force an enactment which had appeared in all special railway acts from a very early date (*s.*). The section (the opening words of which give a power to vary tolls which every special act contains in itself) is as follows:—

Power to vary tolls.

"Whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful therefore for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken either upon the whole or upon any particular portions of the railway, as they shall think fit: Provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

Tolls to be charged equally under like circumstances.

Meaning of Toll in s. 90.

The word "tolls" in the section is not confined to tolls received for the use of the railway only, but includes also the rates charged by the company when acting as carriers in the ordinary manner (*t.*).

(*s.*) The early forms, for an instance of which see the London and Birmingham Railway Act of 1833 (3 & 4 Will. 4, c. xxxvi. s. 181), do not materially differ from the

90th section of the Railways Clauses Act.

(*t.*) See *Evershed's case*, L. R. 3 App. Cas. 1029, and p. 469, post.

It is settled beyond doubt by the *Denaby Main Colliery Co. v. Manchester, Sheffield and Lincolnshire R. Co.* (u), that the proviso, commonly called the "equality clause" of this 90th section, applies only to a conveyance between the same points of departure and arrival, and that mere inequality of charge when unequal distances are traversed does not constitute a preference inconsistent with the concluding words.

The equality clause applies only to conveyance between the same point of arrival and departure.

*The Denaby Main case*

Therefore it does not apply to the common case of a railway company charging lower fares for long than for short distances for the purposes of competition, as was very early decided in *Attorney-General v. Birmingham and Derby Junction R. Co.* (v). In that case the company, whose special act contained an equality clause, charged 8s. from Derby to Hampton, and at the rate of 2s. between Derby and Hampton from Derby to London. Lord Cottenham, C., refused to restrain the imposition of an unequal charge between Derby and Hampton, observing that the equality clause "had not the slightest reference to the case." Nor does the equality clause apply to the case of a charge made in pursuance of a traffic agreement with another company under section 87 of the act (y).

Lower fares for longer distances.

Special charge under traffic agreement with another company.

With the exception of the *Derby case*, the aid of the section has not been invoked on behalf of passengers. In a Scotch case arising out of coal traffic, the House of Lords was equally divided, with the result of affirming the decision of the Court of Session in favour of the company (z); and in the *Denaby Main case* above referred to, it was held not to apply to the carriage of coals from a group of collieries situate at different points along a line at one uniform set of rates. In the majority of the cases, however (and they are many and complicated), it will be found that the plaintiffs were carriers, and that the litigation arose from one of two causes. They had either charged carriers additional rates for "packed parcels," i.e., parcels made up of several parcels in one envelope, or had charged the carriers for a collection and delivery, or other terminal (w) service which the carriers had performed themselves; the object of the railway company uniformly being to take the collection and delivery trade out of the hands of the carriers, and the object of the carriers being to retain it. It may now be taken to be settled by the decision of the House of Lords in *G. W. R. Co. v. Sutton* (b), that extra charges

Coal traffic group rates.

"Packed parcels."

Overcharges in respect of packed parcels may be recovered by action.

*G. W. R. Co. v. Sutton.*

(u) L. R. 11 App. Cas. 97; 55 L. J. Q. B. 181.

(v) 2 Railw. Cas. 124 (A.D. 1840).

(y) *Hull and Barnsley R. Co. v. Yorkshire and Derbyshire Coal, &c., Co.*, L. R. 18 Q. B. D. 761; 56 L. J. Q. B. 261; 35 W. R. 385—C. A.

(z) *Finnie v. Glasgow and South Western R. Co.*, 15 Sess. Ca. 523; 26 L. T.,

O. S. 14. The charges on a branch line differed from those on the main line of the company.

(a) See Chap. XVI., post.

(b) L. R. 4 H. L. 226; 38 L. J., Ex. 177; 18 W. R. 92; affirming *Sutton v. G. W. R. Co.*, 36 L. J., Ex. 18; 3 H. & C. 800 (diss. Erie, C.J.). The series of cases will be found reviewed by Blackburn, J.,

5. *The Equality  
Clause of the  
R. G. Act, 1815.*

to carriers in respect of packed parcels are overcharges, and that they can be recovered back by action. In such an action it is not necessary for the plaintiff to show that he tendered the sum legally due for carriage (c), and (as to packed parcels) it is enough for the plaintiff to show that the company are in the habit of carrying packed parcels for other persons at lower rates than those charged to the plaintiff, without showing affirmatively that the company knew them to be packed (d). The words, "goods of the same description" and "under the same circumstances," in sect. 90, are used not with reference to the contents of the parcels, but to the parcels themselves, that is, they mean goods of the same description for the purposes of carriage, and they are used with reference to the conveyance of the goods and not to the persons who send them (e). So that the company have no right to make distinctions between carriers and the rest of the public (f). And such is the general effect of the cases referred to in the note below (g). These cases turned chiefly on special acts; but it is to be observed (1) that the equality clauses in the special acts differed little, if at all, from the proviso of the 90th section of the Railways Clauses Act; and (2) that the special act almost invariably contained a common form clause as to parcels, of which the following is a sample:—

"With respect to small packages and single articles of great weight, be it enacted, that notwithstanding the rate of tolls prescribed by this act, the company may lawfully demand the tolls following (that is to say), for the carriage of small parcels (that is to say), parcels not exceeding 500 lbs. of weight each, the company may demand any sum (h) which they think fit: Provided always, that articles sent in large aggregate quantities, although made up of several parcels, such as bags of sugar, coffee, meal and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages" (i).

It would seem that a clause of this kind and the equality clause, taken together, do not so much prevent the companies from charging a higher rate, to all the world, for packed parcels, as they prevent the companies charging a higher rate to carriers than to the rest of

in his opinion delivered for the guidance of the House of Lords.

(c) *Parker v. Bristol and Exeter R. Co.*, 6 Exch. 702; 6 R. C. 776; 20 L. J., Ex. 442.

(d) *G. W. R. Co. v. Sutton*, ubi supra.

(e) *Ibid.*

(f) *Crouch v. G. N. R. Co.*, 9 Exch. 558; 11 Exch. 742; *Pickford v. Grand Junction R. Co.*, 10 M. & W. 399.

(g) *Parker v. G. W. R. Co.*, 7 M. & G. 253; *Parker v. S. W. R. Co.*, 11 C. B. 545; *Edwards* (assignee of *Parker*) v. *G. W. R. Co.*, 11 C. B. 538; *Crouch v. G. N. R. Co.*, 9 Exch. 556; 11 Exch. 742 (action for refusal to carry maintained); *Piddington v. S. E. R. Co.*, 5 C. B., N. S. 111; *Baxendale v. G. W. R. Co.*, 14 C. B.,

N. S. 1; affirmed on appeal, 16 C. B., N. S. 137; *Baxendale v. L. and S. W. R. Co.*, L. R. 1 Ex. 137. In the last of these cases it was held that the circumstance of the parcels being doubly addressed made no difference. See also *Parker v. G. W. R. Co.*, 8 E. & B. 77; *Garton v. Bristol and Exeter R. Co.*, 1 B. & S. 112, which latter cases, so far as they decide that no action lies to recover back the overcharge, are overruled by *G. W. R. Co. v. Sutton*, ubi supra.

(h) Semble, per Alderson, B., in *Crouch v. G. N. R. Co.*, 11 Ex. at p. 752, that this means "any reasonable sum."

(i) The clause of the special act of the company in *G. W. R. Co. v. Sutton*, ubi supra.

the world (*k*). And if parcels be addressed to the various individuals only for whom they are ultimately intended, a "parcel rate" may be charged, although the whole body of parcels be consigned to the carrier (*l*); but if each parcel so consigned be addressed doubly, *i.e.*, to the carrier and also to the individual intended to receive it, the tonnage rate only is chargeable, if it be charged to the rest of the public (*m*).

It is clearly settled that where carriers receive their own goods at a terminus, the companies are not entitled to charge the carriers the same sum as they charge to other persons whose goods are delivered by the company at the final place of destination, and that carriers doing collection and delivery themselves may recover rebates from the companies (*n*).

Collection and delivery.

The inability to make an extra charge to carriers for packed parcels extends to contracts made in England for conveyance of parcels to places beyond the sea (*o*), but where the contract is made abroad, the *lex loci contractus* applies, and not the law of England. It has been held, therefore, that a railway company authorized by special act to run steamers between Folkestone and Boulogne, might legally make a double charge for the carriage of packed parcels from Boulogne to London, there being nothing in the law of France against such double charge (*p*).

Sea transit of packed parcels.

An unequal charge was held to be none the less an infringement of the equality clause, although made for the sake of enabling the company making it to compete with another railway company by diverting traffic from such other company. So it was held by the House of Lords in *L. & N. W. R. Co. v. Evershed* (*q*), and *Budil v. L. & N. W. R. Co.* (*r*), in which an unequal charge was made for the purpose of competing with sea carriage, is to the same effect, but s. 27, sub-s. 2, of the Railway and Canal Traffic Act, 1888 (p. 488, post), appears to alter the law in this respect.

Competition no excuse for infringement of equality clause. *Evershed's case*.

The fact that goods carried for one customer are to be shipped to certain ports in order to develop a new trade or open up new markets,

(*k*) But a railway company has no right to open a parcel to see whether it be packed or not: *Crouch v. L. & N. W. R. Co.*, 1 C. & K. 789; nor to force the carrier to disclose the names of the consignors and consignees of the several packages: *Parker v. G. W. R. Co.*, 7 M. & G. 253.

(*l*) *Barendale v. Eastern Counties R. Co.*, 4 C. B., N. S. 63.

(*m*) *Barendale v. L. & S. W. R. Co.*, L. R. 1 Ex. 187.

(*n*) *Pickford v. Grand Junction R. Co.*, 10 M. & W. 399; *Barendale v. Great Western R. Co.*, 14 C. B., N. S. 1; 32 L. J., Q. P. 225 (diss. Erie, C.J.); affirmed on appeal, 16 C. B., N. S. 187; 33 L. J., C. P. 197. See also *Parker v. G. W. R.*

*Co.*, 7 M. & G. 253; *Barendale v. G. W. R. Co.*, 5 C. B., N. S. 386.

(*o*) *Piddington v. S. E. R. Co.*, 5 C. B., N. S. 111.

(*p*) *Branley v. S. E. R. Co.*, 12 C. B., N. S. 63; 31 L. J., C. P. 286.

(*q*) L. R. 3 App. Cas. 1029; 48 L. J. Q. B. 22; 39 L. T. 306. Unanimously affirming two unanimous judgments below, L. R. 3 Q. B. D. 135, and L. R. 2 Q. B. D. 254.

(*r*) 36 L. T. 803. This case was argued upon the construction of s. 2 of the Railway and Canal Traffic Act, 1854. The Court followed *Evershed's case*, L. R. 2 Q. B. D. 254.

3. *The Equality  
Case of the  
R. v. ... 1817.*

and so increase the tonnage carried, does not constitute a difference in circumstances so as to justify inequality (s), but a difference in the cost of carriage does, and a company acting in good faith are not bound to show that allowances to a preferred customer adequately represent the saving to the company (t).

Injunction.

The Court of Exchequer refused to grant an injunction under the Common Law Procedure Act of 1854, to restrain a company from charging a carrier otherwise than in conformity with the equality clause (u).

6. *Traffic Facilities,  
Act, (Common  
Pleas),*

6. *The Law of Traffic Facilities, Equal Treatment, and Through Traffic, and its Administration by the Court of Common Pleas.*

Railway and  
Canal Traffic  
Act, 1854, s. 2.  
Obligation to  
afford "reason-  
able" facilities,  
&c.

The numerous Railway Amalgamation Bills of the Session of 1853, led to the appointment of a Select Committee, of which Mr. (now Lord) Cardwell became chairman. This Committee made five separate reports, and recommended that Parliament should secure "freedom and economy of transit from one end of the kingdom to the other," and should compel railway companies to give the public the full advantage of convenient interchange from one railway system to another. The practical result was the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and the new obligation imposed upon railway companies by the second section of that act. This section, which applies to railway and canal companies alike, has substantially three branches (x) and provides that every company must (1) afford "reasonable" facilities for forwarding its own traffic; (2) must afford "reasonable" facilities for forwarding its through traffic; and (3) must abstain from all "unreasonable" preference of any particular person or particular traffic (y).

Injunction.  
Sect. 3.

The 3rd section enacts, that any person complaining of a contravention of the act, may apply to the Courts of Common Pleas in England or Ireland, or the Court of Session in Scotland, for an injunction enjoining obedience to the act.

The 2nd section of the Act of 1854 was imported verbatim into sect. 11 of the Act of 1873, so that it would seem to have been the intention of the Legislature that the Railway Commissioners should administer the Act of 1854 upon the principles laid down by the Courts which they superseded. The Court of Common Pleas itself,

(s) *The Denaby Main Case*, p. 467, ante.

(t) *Ib.*

(u) *Sutton v. G. IV. R. Co.*, 4 H. & C. 325.

(x) See per Lord Selborne, L.C., in *South*

*Eastern R. Co. v. Railway Commissioners*, L. R. 6 Q. B. D. at p. 591.

(y) See 6th edition of this work, p. 474 for the opinion of Sir W. Hodges as to the importance of this section.

in *Palmer v. London and South Western R. Co.* (z), was equally divided upon the important question whether its own decisions were binding as precedents; and it is impossible to read through the body of decisions of the Court of Common Pleas without regretting both the absence from the act of any criterion but the vague one of reasonableness, and the absence from the Court of technical information. It was, moreover, inevitable that the opinions of particular judges should contribute to the decision more than is usual with purely legal judgments (a).

The following table, which may be compared with the table of the decisions of the Railway Commissioners (p. 476, post), shows shortly the names and results of the various cases (aa).

Table of decisions of Common Pleas, under Traffic Act, 1861.

#### PASSENGER TRAFFIC.

- Hozier v. Caledonian R. Co.*, 1 Nev. & Mac 27; 24 L. T., O. S. 399—Preference of passenger terminal to intermediate traffic—Petition refused—No competition of interest, or personal disadvantage to the complainant.
- Barret v. G. N. & Mid. R. Cos.*, 1 Nev. & Mac. 38; 1 C. B., N. S. 423—Refusal by two companies to run through passenger trains—Rule discharged—No public inconvenience made out.
- Caterham R. Co. v. London & Brighton R. Co.*, 1 Nev. & Mac. 32; 1 C. B., N. S. 410—Complaint of (a) preference in fares on branch lines; (b) that trains did not stop often enough at junction; (c) that third-class return tickets were not granted; (d) no covered station at junction—Rule refused on ground as to (a) that preference is not undue, unless it be shown on same portion of line; as to (b) and (c) that Caterham was treated on equality with stations of similar character; as to (d) rule nisi granted, but no cause shown.
- Jones v. Eastern Counties R. Co.*, 1 Nev. & Mac. 45; 3 C. B., N. S. 324—Issue of season tickets for longer journey over same line at less price—Rule refused—Journeys not substantially the same.

#### OMNIBUS, &C., TRAFFIC.

- Marriott v. L. & S. W. R. Co.*, 1 Nev. & Mac. 47; 1 C. B., N. S. 499—Admission to station-yard of omnibuses of one proprietor only—Rule absolute—Balance of convenience against the public.

(z) L. R. 1 C. P. 588.

(a) It was first intended that the act should be administered by all the Superior Courts of Common Law indiscriminately, but the majority of the judges being strongly of opinion that the duties were not judicial, this project was abandoned, and the Court of Common Pleas substituted at the voluntary suggestion of Chief Justice Jervis. It was observed in the House of Lords, by Lord Campbell, that "the code was not one which the judges could interpret, inasmuch as it left them

altogether to exercise their discretion as to what was reasonable, with no statutable or common law authority to guide them;" and by Lord Lyndhurst, that "the questions that would arise under the act were, so vague and so incapable of being reduced to fixed rules, that it was impossible conflicting decisions should not be given."

(aa) The more important of the cases were also treated at length, with extracts from the judgments, in the 7th edition of this work.



6. Traffic Facilities, &c. (Common Pleas).

- Beadell v. Eastern Counties R. Co.*, 1 Nev. & Mac. 56 ; 2 C. B., N. S. 509—Admission to station-yard of cabs of one cab proprietor only—Rule refused—No public inconvenience : authority of Barret's case.
- Painter v. London & Brighton R. Co.*, 1 Nev. & Mac. 58 ; 2 C. B., N. S. 702—Admission to station-yard of cabs of five cab proprietors only—Rule refused—No substantial public inconvenience ; complaint should come from those who use the railway.
- Ilfrcombe Public Conveyance Co. v. L. & S. W. R. Co.*, 1 Nev. & Mac. 61—Partial exclusion from station-yard—Rule refused—No sufficient case made out : authority of Beadell's case.

#### SEA TRAFFIC.

- Bennett v. Manchester, Sheffield & Lincolnshire R. Co.*, 1 Nev. & Mac. 289 ; 6 C. B. N. S. 707—Complaint that company, being proprietors of two docks, purposely diverted traffic from one to the other—Case held not to be within the act.
- Nepier v. Glasgow and South Western R. Co.*, 1 Nev. & Mac. 292 ; 4 Sess. Ca. 87—Preference of owner of rival passenger steamer, by allowing him through rates and refusing them to complainant—Case held not to be within the act.

#### COAL TRAFFIC.

- Crickmar v. Eastern Counties R. Co.*, 26 L. T., O. S. 220—Preference of a certain coal company, of which an officer of the company complained of was a principal proprietor—Rule nisi.
- Ransome (No. 1) v. Eastern Counties R. Co.*, 1 Nev. & Mac. 63 ; 1 C. B., N. S. 437—Preference of Peterborough merchants' (railway borne) to Ipswich merchants' (sea borne) coal—Rule absolute, on the ground that the object of the preference was to enable the Peterborough to compete with the Ipswich coal merchants.
- Ransome (No. 2) v. Eastern Counties R. Co.*, 1 Nev. & Mac. 109 ; 4 C. B., N. S. 135—Complaint (a) of preference of Peterborough coal merchants in assignment of districts and refusal to carry coal except in train loads ; and (b) of preference in scale of rates—As to (a) rule discharged on the ground that the arrangements of the company were for the convenience of their coal traffic ; as to (b) rule absolute, on the ground that effect of scale was to diminish advantage from natural proximity.
- Ransome (No. 3) v. Eastern Counties R. Co.*, 1 Nev. & Mac. 116 ; 4 C. B., N. S. 159—Disobedience of injunction in *Ransome (No. 2b)*. Application for attachment—Rule discharged.
- Ransome (No. 4) v. Eastern Counties R. Co.*, 1 Nev. & Mac. 155 ; 8 C. B., N. S. 709—Similar to *Ransome (No. 2)* and that trains were broken up at Cambridge—Rule discharged on the authority of *Ransome (No. 2)*.
- Wade (No. 1) v. North Eastern R. Co.*, 1 Nev. & Mac. 72 ; 1 C. B., N. S. 454—Refusal to carry coal—Rule discharged, on the ground that the company were not common carriers of coal.
- Ditto*—Through rates : preference of coal carried by company in conjunction with Great Northern and Midland—Rule partly discharged, on the ground that difference of cost justified the preference : partly absolute, on the ground that the motive was to introduce northern coal into Staffordshire.

- Oxlade* (No. 1) v. *North Eastern R. Co.*, 1 Nev. & Mac. 72; 1 C. B., N. S. 454—Preference in refusing to provide depôts—Rule discharged.
- Ditto—Preference in refusing facilities for receiving, &c.—Rule discharged, on ground that peculiarities of the coal traffic justified the preference.
- Ditto—Refusal to provide trucks—Rule discharged, on ground that complainant refused to pay demurrage.
- Ditto—Preference in refusing facilities for unloading—Rule discharged.
- Oxlade* (No. 2) v. *North Eastern R. Co.*, 1 Nev. & Mac. 162; 15 C. B., N. S. 680—Refusal to carry coal except for colliery owners—Rule discharged—Authority of *Oxlade* (No. 1), and peculiar circumstances of coal traffic.
- Harris v. Cockermouth R. Co.*, 1 Nev. & Mac. 97; 3 C. B., N. S. 693—Preference of certain colliery owners, being tenants of Lord Lonsdale—Rule absolute—Threat of landlord to construct an opposing line no legitimate ground of preference to his tenants.
- Nicholson v. G. W. R. Co.*, 1 Nev. & Mac. 121; 5 C. B., N. S. 366—Preference of Ruabon coal in consideration of regular guaranteed traffic under special agreement—Rule discharged—Agreement adequate consideration for preference complained of.
- Same v. Same*, 1 Nev. & Mac. 143; 7 C. B., N. S. 755—Complaint that agreement sanctioned in above case was not comparatively fair—Court divided; rule dropped.
- West v. L. & N. W. R. Co.*, 1 Nev. & Mac. 166; L. B., 5 C. P. 622—Refusal to allow storage for coal similar to that allowed to another coal merchant—Court divided; rule dropped.

#### TRAFFIC OF CARRIERS.

- Baxendale v. North Devon R. Co.*, 1 Nev. & Mac. 180; 3 C. B., N. S. 324—Preference of company's agents, by extra charge to other persons—Rule absolute.
- Baxendale v. G. W. R. Co.* (Bristol case), 1 Nev. & Mac. 191; 5 C. B., N. S. 309—Preference of a paper maker, in consideration of his sending all his goods by line of company only—Rule absolute—Agreement not legitimate, as relating to traffic distinct from goods which were the subject of it.
- Baxendale v. G. W. R. Co.* (Reading case), 1 Nev. & Mac. 202; 5 C. B., N. S. 336—Complaint that company, advertising that they would collect and deliver gratis, charged for carrying, collecting and delivery in one lump sum—Rule absolute—Object of the company to get collecting business into their own hands not legitimate.
- Ditto, 1 Nev. & Mac. 213; 5 C. B., N. S. 356—Application of company for re-hearing, on the ground that they made no profit—Application refused—Undue prejudice, whether profit made or not.
- Copper v. L. & S. W. R. Co.*, 1 Nev. & Mac. 185; 4 C. B., N. S. 738—Preference of company's agent by unloading gratis for such agents—Rule discharged—Application wrongly framed.
- Curton v. G. W. R. Co.*, 1 Nev. & Mac. 214; 28 L. J., C. P. 158—Similar complaint to that in *Baxendale's* Reading case—Rule absolute—That there was undue prejudice, whether profit was made or not.

6. *Traffic Facilities, &c. (Common Pleas).*

- Garton v. Bristol & Exeter R. Co.*, 1 Nev. & Mac. 218 ; 6 C. B., N. S. 639—  
Preference of company's agent by compelling persons to employ him—  
Rule absolute, on authority of Baxendale's Reading case.
- Ditto—Preference of company's agent by taking in goods at late hour—Rule  
absolute, on authority of Baxendale's Reading case.
- Ditto—Preference of certain tradesmen by special agreement—Rule absolute  
—Preference *prima facie* undue, and not justified.
- Wannan v. Scottish Central R. Co.*, 1 Nev. & Mac. 237 ; 2 Sess. Ca. 1373—  
Refusal of company to comply with general orders to deliver goods and  
to hand over goods to complainant, although addressed to his care—  
Petition dismissed.
- Pickford v. Caledonian R. Co.*, 1 Nev. & Mac. 252 ; 4 Sess. Ca. 755—  
Similar to Wannan's case—Petition refused, on authority of Wannan's  
case.
- Ditto—Preference of company's agents within station—Petition dismissed, on  
the ground that that company might thus far prefer their own agents,  
not being separate traders.
- Baxendale v. B. & E. R. Co.*, 1 Nev. & Mac. 229 ; 11 C. B., N. S. 787—Pre-  
ference of company's agent, by dispensing with signature of Conditions—  
Rule absolute.
- Baxendale v. L. & S. W. R. Co.*, 1 Nev. & Mac. 231 ; 12 C. B., N. S. 768  
—Similar to Garton's case—Rule absolute, on authority of Garton's  
case.
- Palmer v. L. & S. W. R. Co.*, 1 Nev. & Mac. 271 ; L. R., 1 C. P. 588—  
Similar to Garton's and Baxendale's cases—Court divided as to whether  
previous decision binding ; rule dropped.
- Palmer v. L. B. & S. C. R. Co.*, 1 Nev. & Mac. 243 ; L. R., 6 C. P. 194—  
Similar to Garton's and Baxendale's cases—Rule absolute, on authority  
of Baxendale's and Garton's cases.
- Parkinson v. G. W. R. Co.*, L. R., 6 C. P. 554—Refusal to act on general  
orders of consignees to deliver their goods to complainant, and preference  
of company's agent by acting upon such orders when in favour of  
such agent—Rule absolute, on authority of Baxendale's and Garton's  
cases.

Conflict between  
English and  
Scotch Courts.

It will have been seen from *Wannan's case* and *Parkinson's case*, that the English and Scotch cases are in conflict on the question of general orders (b).

General result of  
cases decided by  
Common Pleas.

It is not easy to arrive at any but a very broad general result of the whole series of cases. It is evident, however, that the profit accruing to a company from any preference was a main element of consideration, except where the profit was not one directly accruing to the company as a railway company. The convenience of the company was also considered, but mostly only because it was supposed to be identified with the convenience of the public. General

(b) The Railway Commissioners followed *Parkinson's case* in an Irish case (*Fishbourne v. Great Southern and Western R. Co.*, 2 Nev. & Mac. 224, p. 477, post) ; but

*Wannan's case* in a Scotch case (*Mennie v. Caledonian R. Co.*, 5 R. & C. T. C. 303, p. 477, post).

public interests indeed were kept in view with remarkable steadiness by the Court, seeing that those interests were wholly unrepresented, and had only the Court to protect them. Where general public interest was the sole question for the Court, as in *Barret's case* and in the *Cab cases*, it was plainly intimated that this must be a substantial public interest, and not that of a few isolated persons. It was further laid down that a preference, to be undue, must be the preference of a person similarly circumstanced with the complainant, and "similarly circumstanced" was, as far as direct decisions go, made to include "travelling on the same portion of a line." These principles, to which little exception could be taken, were all extracted from the words "due and reasonable," &c., of the statute, without direct reference to other authorities. In the application of them, only the previous decisions of the Court itself were used as guides, and it ultimately came to be doubted whether those decisions were binding as precedents or not. Although, therefore, the principles of the decisions are plain enough, little, if any, light is thrown on the very difficult question of how far each of them ought to be applied when they should happen to be conflicting (c).

7. *The Law of Traffic Facilities, "Undue Preference," and Through Rates, as administered by the Railway Commissioners.*

7. *Traffic Facilities, &c. (Railway Commissioners).*

The 2nd section of the Act of 1854 consists of three (d) branches: (1) enjoining accommodation of main traffic; (2) prohibiting undue preference; and (3) enjoining accommodation of through traffic. And the 11th section of the Act of 1873 extended the 2nd section of the Act of 1854, by applying it to the accommodation of through traffic at *through rates* (e).

(c) As regards the "undue preference" branch of the act, "the effect of the decisions seems to be that a company is bound to give the same treatment to all persons equally under the same circumstances; but that there is nothing to prevent a company, if acting with a view to its own profit, from imposing such conditions as may incidentally have the effect of favouring one class of traders or one town, or one portion of their traffic, provided the conditions are the same for all persons, and are such as lead to the conclusion that they are really imposed for the benefit of the railway company." (Report of Amalgamation Committee, p. xlii, n.) As to whether the cases are binding as precedents, see *Palmer's* (No. 1) case. For an instance of a difficulty (left unsolved) in applying conflicting principles, see *Nicholson's* (No. 2) case.

(d) See per Lord Selborne, C., in *South Eastern R. Co. v. Railway Commissioners*, L. R. 6 Q. B. D. at p. 591.

(e) 1 C. B., N. S. 423. It has been said that the first branch of the section proved practically inoperative; while with regard to the second, although no fault had been found with the decisions, complaints had been made of the expense of contesting cases with powerful railway companies, and that questions of undue preference were often so technical, and so connected with questions of due facilities, that they had not been contested so much as they might have been if speedy reference could have been made to a tribunal having practical knowledge of the subject. (Report of Select Committee, 1872, p. xlii, and note.)

7. *Traffic Facilities, &c. (Railway Commissioners).*

Through Rates,  
R. R. Act, 1878,  
s. 11.

This section, which is repealed but re-enacted with amendments (f) by the Act of 1888, enacted that the facilities to be afforded under the 2nd section of the Act of 1854 should include—

“The due and reasonable receiving, forwarding and delivering by every railway company and canal company, and railway and canal company *at the request of any other such company*, of through traffic to and from the railway or canal of any other such company at through rates, tolls and fares, in this act referred to as through rates” (g).

The nine provisoes which followed are also re-enacted with amendments (f) by the Act of 1888.

\* Page 471, *ante*.

Table of cases  
decided by  
Commissioners.

The following table, which may be compared with the table of the Common Pleas decisions,\* shows shortly the nature of the various cases that have come before the Railway Commissioners under the Railway and Canal Traffic Act, 1854, as amended by the Regulation of Railways Act, 1873:—

#### PASSENGER TRAFFIC.

- Dover (Corporation of) v. S. E. and L. C. & D. R. Cos.*, 1 Nev. & Mac. 349—Preference of Ramsgate and Margate to Dover both in facilities and fares—Case compromised.
- Innes v. L. B. & S. C. R. Co. and L. & S. W. R. Co.*, 2 Nev. & Mac. 155—Insufficient trains: Order for through booking: Inconvenient station—Application of Acts to company as carriers.
- Uckfield Local Board v. L. B. & S. C. R. Co. and S. E. R. Co.*, 2 Nev. & Mac. 214—Order for conduct of through traffic *rid* Tunbridge Wells.
- James v. Tuff Vale R. Co.*, 3 Nev. & Mac. 540—Order for conduct of through traffic along 55 chains of line connecting two stations.

#### COAL AND IRON TRAFFIC.

- Lees v. L. & Y. R. Co.*, 1 Nev. & Mac. 352—Preference of corporation of Manchester to complainant in carrying coal to Oldham station for corporation only—Held reasonable, as being for the public interest.
- Nitahill, &c., Coal Co. v. Caletonian R. Co.*, 2 Nev. & Mac. 39—Preference of four colliery owners to complainant: Carriage of splint and cannon coal at unequal rates held unreasonable.
- Belladyke Coal Co. v. North British R. Co.*, 2 Nev. & Mac. 105—Preference of firm of iron and coal masters to company being coal masters only—Extra charge for inclines.
- Foreman v. G. E. R. Co.*, 2 Nev. & Mac. 202—Preference of Peterborough traders to Yarmouth traders—Injunction granted.
- Denaby Main Colliery Co. v. Manchester, Sheffield and Lincolnshire R. Co.*, 3 Nev. & Mac. 426—Uniform “group” rate for coal districts held undue; affirmed in High Court, *ib.* 438: and in Court of Appeal, *ib.* 441.
- Lloyd v. Northampton R. Co.*, 3 Nev. & Mac. 259—Similar group rate from sidings held not undue.

(f) See the effect of the amendments, sect. 8 (d), post.

(g) The object of the amendment was to make it “the interest of the one com-

pany and the duty of the other always to send traffic by the shortest, cheapest and most convenient route.” (Report of Amalgamation Committee, p. xlv.)

*Locke v. N. B. R. Co.*, 3 Nev. & Mac. 44—Extra charge to colliery owners not renting cells at stations held undue.

*Broughton & Plas Power Coal Co. v. G. W. R. Co.*, 4 R. & C. T. C. 191—Carriage of coal from South Wales collieries to Birkenhead (average distance 30 miles) at uniform rate of 6s. per ton, and from North Wales collieries to Birkenhead (average distance 150 miles) at average rate of 2s. 2d. per ton—Held not undue prejudice to North Wales colliery owners.

*Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire R. Co.*, 4 R. & C. T. C. 28—Undue prejudice in canal tolls restrained.

*Skinningrove Iron Co. v. N. E. R. Co.*, 5 R. & C. T. C. 244—Preference in order to enable preferred party to compete held undue, but not restrained, as applicants not shown to be aggrieved—Non-reduction of rates in correspondence with reduced maximum not undue prejudice.

#### SLATE TRAFFIC.

*Diphwys Casson Slate Co. v. Festiniog R. Co.*, 2 Nev. & Mac. 73—Preference of quarry owners in consideration of agreed custom to railway for fixed number of years—Held unreasonable.

*Holland v. Festiniog R. Co.*, 12 Nev. & Mac. 278—Preference in consideration of agreed custom for 30 as against 14 years—Held unreasonable.

#### TRAFFIC OF CARRIERS.

*Goddard v. L. & S. W. R. Co.*, 1 Nev. & Mac. 3—Allowance for cartage and empties: Refusal to give credit.

*Fishbourne v. Great Southern & Western R. Co., Ireland*, 2 Nev. & Mac. 224—Delivery by company's own agents, in disregard of direction in consignment note to deliver to complainants, restrained.

*Fishbourne v. Midland Great Western R. Co., Ireland* (No. 1), Browne's Practice, p. 35—Preference of company's agents in allowing 2d. on parcels brought by them to station, while they allowed nothing to complainants on parcels which complainants collected and brought—Injunction issued.

*Robertson v. Midland Great Western R. Co., Ireland*, 2 Nev. & Mac. 409—Preference of company's agents in allowing them 2d. on stamped parcels, while they made no corresponding allowance to complainants—Injunction refused.

*Greenop v. S. E. R. Co.*, 2 Nev. & Mac. 319—Preference in rates between Boulogne and London in consideration of guaranteed monthly traffic—Held reasonable.

*Menzies v. Caledonian R. Co.*, 5 R. & C. T. C. 306—Preference of company's agent held undue, and company ordered to pay 10d. a ton to complainant performing collecting service—Wannan's case (ante, p. 474) followed as a Scotch case in Scotland, and delivery by company's own agents in disregard of direction by consignees not restrained.

#### SEA TRAFFIC.

[See also "Through Rates."]

*Southsea, &c., Ferry Co. v. L. & S. W. R. Co. and L. B. & S. C. R. Co.*, 2 Nev. & Mac. 341—Issue of through tickets to rival steam packet company only.

7. Traffic Facilities, &c. (Bridges & Commissioners).

- City of Dublin Steam Packet Co. v. L. & N. W. R. Co.*, 4 R. & C. T. C. 10—Through rates for passengers between Kingstown and London *via* the applicants' steamers and the respondents' railway, refused on the ground that the applicants had agreed that the charges between London and Kingstown by the respondents were to be fixed from time to time by the respondents—Difference between fares from London to Dublin by respondents' mail route through Kingstown and applicants' "North Wall" route reduced as excessive.
- Caledonian R. Co. v. Greenock and Wemyss Bay R. Co.* (No. 2), 4 R. & C. T. C. 70—Arrangement for "using," to come within sect. 11 of Act of 1873, must be definite—Application within five weeks of end of a season refused as too late.
- Ayr Harbour Trustees v. P. Barr & Co., Glasgow, and South Western and other Railway Companies*, 4 R. & C. T. C. 81—Granting of through rates at other ports, and the refusal of them at a particular port, not an undue preference of which a steamboat owner or a harbour board at the particular port can complain. (Law altered by s. 30 of Act of 1888.)
- Caledonian R. Co. and Others v. Greenock and Wemyss Bay R. Co. and Others*, 4 R. & C. T. C. 135—Through rates granted, though arrangement for working steam vessels made by company whose line did not directly communicate with them.
- Londonderry Port Commissioners v. Great Northern R. Co. of Ireland and Others*, 5 R. & C. T. C. 282—Preference to Greenore over Derry held not undue.

#### TRAFFIC OF BREWERS AND MALTSTERS.

- Thompson v. L. & N. W. R. Co.*, 2 Nev. & Mac. 115—Preference of rival breweries to complainants not justified on grounds of competition of defendants with Midland R. Co.
- Bell v. L. & N. W. R. Co. and Midland R. Co.*, 2 Nev. & Mac. 186—Preference of brewers to complainant, a timber merchant, in allowing brewers excessive drawback in respect of haulage on their own branch lines—Drawback ordered to be reduced.
- Richardson v. Midland R. Co.*, 4 R. & C. T. C. 1—Preference of outward beer traffic from Burton to outward beer traffic from Newark to the extent of 25 to 30 per cent., held justified by special advantages received by company, except in respect of consignments not exceeding 500 lbs. in weight. Preference of outward bottled beer traffic from other stations to which the beer had been sent from Burton to be bottled, to outward bottled beer traffic from Newark, held not justified. Preference of inward malt, hops, and barley traffic to Burton over the same inward traffic to Newark, held not justified.
- Gimlot, Elyon & Co. v. Midland R. Co.*, 4 R. & C. T. C. 291—Preference in Burton rates for barley and malt over Derby rates for barley and malt restrained, but allowance made for different average weight of truck load, and certainty of back loads, and any extra cost of carriage.

#### TRAFFIC FACILITIES.

- Aberdeen Commerce & Co. v. Great North of Scotland R. Co.*, 3 Nev. & Mac. 203—Affirmed by Court of Session. Refusal to carry manures as common carriers, and requirement of special and excessive rates—Held undue prejudice.

*Chatterley Iron Co. v. North Staffordshire Iron Co.*, 3 Nev. & Mac. 238—Same point as above.

*Young v. Gwendraeth R. Co.*, 4 R. & C. T. C. 247—Same point as above.

*Watkinson v. Wrescham, &c., R. Co.* (No. 3)—3 Nev. & Mac. 446—Order to manage railway properly and supply sufficient locomotive power, &c.

*Tharsis Sulphur & Copper Co. v. L. & N. W. R. Co.*, 3 Nev. & Mac. 455—Order to provide sufficient waggons for traffic of persons occupying works adjacent to line transferred by special act containing clause imposing special obligation.

*Dublin Whiskey Distillery Co. v. Midland Great Western R. of Ireland Co.*, 4 R. & C. T. C. 32—Junction with private siding refused.

*Swindon, &c., R. Co. v. G. W. R. Co.*, 4 R. & C. T. C. 173—Facilities necessary to exercise of running powers refused, there being immediate prospect of statutory powers which would give better relief.

*Hammons v. G. W. R. Co. and Swindon, &c., R. Co.*, 4 R. & C. T. C. 181—Facilities for through traffic route mainly on ground that route not yet authorized by Board of Trade.

*Beeston Brewery Co. v. Midland R. Co.*, 5 R. & C. T. C. 53—Siding accommodation.

*Same v. Same*, 5 R. & C. T. C. 60—Discontinuance of siding accommodation held undue prejudice (diss. Mr. Commr. Price), but accommodation not ordered to be continued, except on terms of applicants agreeing to pay certain station to station rates.

#### FINH TRAFFIC.

*Woodger v. G. E. R. Co.*, 2 Nev. & Mac. 103—Infringement of equality clause by scale of package rates—Injunction granted.

#### GENERAL.

*Macfarlane v. North British R. Co.*, 4 R. & C. T. C. 269—Injunction granted to restrain undue preference (in rates for rain-water goods and castings) though ground of complaint removed before hearing.

*Merry v. Glasgow & South Western R. Co.*, 4 R. & C. T. C. 383—A disproportion of charge under the short distance clause (for hematite and limestone) held not undue preference.

#### THROUGH TRAFFIC (h).

*Tuomer v. L. C. & D. R. Co. and S. E. R. Cos.*, 3 Nev. & Mac. 72—Order for conduct of through traffic at Strood Junction—Prohibited, L. R. 2 Ex. D. 450.

*Victoria Coal & Iron Cos. v. Neuth & Brecon R. Co.*, 3 Nev. & Mac. 37—Obligation to afford facilities not limited to cases in which company has accommodation to take over traffic at point of junction.

*Great North of Scotland R. Co. v. Highland R. Co.*, 5 R. & C. T. C. 103—Exchange of traffic between two companies free to exchange at any junction between their lines—Various facilities ordered in timing of trains, &c.

(h) As to booking through traffic under an agreement, see *Central Wales, &c. R. Co. v. L. and N. W. R. Co.*, 3 Nev. & Mac. 101; as to meaning of "run in conjunction" in special act, see *Caledonian*

*R. Co. v. Great Northern, North Eastern, and North British R. Cos.*, 2 Nev. & Mac. 377; as to forwarding Pullman car, see *Caledonian R. Co. v. North British R. Co.*, 3 Nev. & Mac. 56.



Traffic Fuel-  
-&c. (Railway  
Commissioners').

## FACILITIES AT STATIONS.

- Thomas v. North Staffordshire R. Co.*, 3 Nev. & Mac. 1—Refusal to deliver damageable traffic (potatoes, &c.), at Tunstall, a passenger and mineral station, such traffic being delivered at Longport station, distant  $1\frac{1}{2}$  miles—Held reasonable.
- Hastings Town Council v. S. E. R. Co.*, 3 Nev. & Mac. 179, 464—Order to improve station—Prohibited in part, L. R. 6 Q. B. D. 506—(C. A.).
- Newington Local Board v. N. E. R. Co.*, 3 Nev. & Mac. 300—Application for new passenger station refused—Siding accommodation ordered.
- Holyhead Local Board v. L. & N. W. R. Co.*, 4 R. & C. T. C. 37—Application for foot-bridge over railway refused.
- Harris v. L. & S. W. R. Co.*, 3 Nev. & Mac. 331—Application for station refused.
- Howard v. Midland R. Co.*, 3 Nev. & Mac. 253—Rebate on account of station services to customer not requiring them refused.

## THROUGH RATES AND ROUTES (ACT OF 1873, s. 11) (i).

[See also "Sea Traffic."]

- East & West Junction R. Co. v. G. W. R. Co.*, 1 Nev. & Mac. 331—Route proposed with object of making mileage of sending company more and of forwarding company less—Held not reasonable.
- Same Co. v. Same Co.*, 2 Nev. & Mac. 147—Lesser through rate on shorter of two alternative routes allowed on condition of sending company guaranteeing a certain average traffic.
- Central Wales, &c., R. Co. v. L. & N. W. R. Co.*, 2 Nev. & Mac. 191—Delay of through traffic: Right of intermediate company to apply for through rates.
- Greenock and Wemyss Bay R. Co. v. Caledonian R. Co.* (No. 3), 2 Nev. & Mac. 227—Apportionment of through rates: *Locus standi* of company whose line is worked by forwarding company—Aff. 5 Sc. Sess. Ca., 4th Series 995; 3 Nev. & Mac. 145.
- Newry and Armagh R. Co. v. G. N. of Ireland R. Co.*, 3 Nev. & Mac. 28—Through rates for traffic in owners' waggons, to differ from through rates for traffic in company's waggons—Refused.
- Warwick and Birmingham Canal Navigation v. Birmingham Canal Navigation and many Others*, 3 Nev. & Mac. 113—Order for through canal tolls—Prohibited, L. R. 5 Ex. D. 1.
- North Monkland R. Co. v. North British R. Co.*, 3 Nev. & Mac. 282—Through rates not in accordance with statutory agreement—Refused.
- Caledonian R. Co. v. North British R. Co.*, 3 Nev. & Mac. 403—Through rates and route granted, though objected to on ground that forwarding company had alternative and competing route for greater part of distance.
- Great Northern R. Co. of Ireland v. Belfast Central R. Co.*, 3 Nev. & Mac. 411—Through rates refused, in order not to raise long established rate and unsettle interests founded on its continuing.

(i) For cases under special acts, see *G. W. R. Co. v. Central Wales, &c. R. Co.*, 5 R. & C. T. C. 1; for reference as to apportionment of through rates, see *Greenock and Wemyss Bay R. Co. v. Caledonian*

*R. Co.* (No. 2), 2 Nev. & Mac. 136; *Solway Junction R. Co. v. Maryport and Carlisle R. Co.*, 3 Nev. & Mac. 284; *L. & N. W. R. Co. v. G. W. R. Co. and Central Wales R. Co.*, 5 R. & C. T. C. 20.

*Belfast Central R. Co. v. Great Northern of Ireland R. Co.*, 3 Nev. & Mac. 419

—Through rates for coal traffic in part granted and in part refused.

*Same v. Same*, 4 R. & C. T. C. 159—Through rates for coal granted.

*Central Wales, &c., R. Co. and Mid Wales R. Co. v. G. W. R. Co. and Others*, 4 R. & C. T. C. 11—Right of intermediate company, though not working their line, to apply for through rates, which were granted—Aff. in High Court, L. R. 10 Q. B. D. 231.

*Central Wales, &c., R. Co. v. L. & N. W. R. Co. and G. W. R. Co.*, 4 R. & C. T. C. 211—Through rates and route for Haverfordwest traffic granted, though traffic small, though no time saved, and though number of exchanges great—Existence of alternative routes approved.

*Swindon, Marlborough and Andover R. Co. v. G. W. R. Co. and L. & S. W. R. Co.*, 4 R. & C. T. C. 349—Through rates and route by lines of two forwarding companies ordered—Existence of alternative route approved.

*Belfast Central R. Co. v. Great Northern R. Co. of Ireland*, 4 R. & C. T. C. 379—What is an arrangement for using, &c., steam vessels within sect. 11 of Act of 1873.

*Talylyn R. Co. v. Cumbrian R. Co.*, 5 R. & C. T. C. 122—In deciding through rate where traffic carried on one of the railways is a "short distance," the short distance clause is to be taken into account in favour of such company.

*Metropolitan District R. Co. v. Metropolitan R. Co.*, 5 R. & C. T. C. 126—Application for through passenger fares and booking not entertained on sole ground that litigation with same object pending in Ch. D.

*Severn and Wye and Severn Bridge R. Co. v. G. W. R. Co.*, 5 R. & C. T. C. 156—Allowance for one year of through rates *via* Severn Bridge.

*Same v. Same*—Through rates *via* Severn Bridge continued, notwithstanding the opening of the Severn tunnel—Refusal to state case on question of public interest, as being one of fact.

With regard to the whole series of cases which came before the Railway Commissioners, and the distinction between their judgments and those of the Court of Common Pleas which preceded them, the following observations may be made :—

1. The Commissioners, during the first ten years of their sittings, were in the habit of delivering one single judgment, whereas the judges of the Court of Common Pleas frequently differed in opinion and pronounced separate judgments.

2. The Commissioners, though not much referring to the judgments of the Court of Common Pleas by name, followed the principles of those judgments as far as there were any, and in no case expressly departed from them.

3. The judgments of the Commissioners are replete with details of a character the Court of Common Pleas did not go into.

4. The Commissioners, in addition to having the correctness of their judgments questioned by special case, were frequently pro-

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hibited from exceeding their jurisdiction, whereas the judgments of the Court of Common Pleas could not be questioned.

*Traffic Facilities, &c. (Railway and Canal Commission).*

# 8. *The law of Traffic Facilities, Undue Preference, and Through Rates, as it may be administered by the Railway and Canal Commission.*

## (a) *Generally.*

The constitution of the Railway and Canal Commission, and its jurisdiction generally, together with the *locus standi* before it, and the mode of questioning its decisions on points of law, have been already dealt with (k). It is now proposed to examine that part of the jurisdiction under which the Commission is entrusted with the enforcement of the 2nd section of the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, which section is as follows:—

“Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.”

Definition of “Traffic” and “Railway”

By s. 1, the word “traffic” includes not only passengers and their luggage, and goods and animals, but also carriages, trucks, and boats, &c., and “railway” includes every station (l) used for public traffic.

The three branches of section 2 of the Act of 1854.

The 2nd section of the Act of 1854 contains three (m) branches

(k) Ante, ch. xi.; and see the act of 1848 and the rules thereunder set out at length in vol. II.

(l) The act of 1854 s. 3 adds “wharf

or dock.”

(m) See per Lord Selborne, C., in *South Eastern R. Co. v. Railway Commissioners*, L. R. 10 B. 10 at p. 101 C.

(1) enjoining facilities for main traffic; (2) prohibiting undue preference; and (3) enjoining facilities for through traffic.

The 25th section of the Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, replacing part of the 10th section of the Regulation of Railways Act, 1868, and the whole of the 11th section of the Regulation of Railways Act, 1873, extends the 2nd section of the Act of 1854, which it recites verbatim, to sea traffic and to through rates.

Extension of the section to sea traffic and through rates by the Acts of 1868, 1873, and 1888.

The Act of 1888 newly and further extends the 2nd section of the Act of 1854 by empowering the Commission to order traffic facilities notwithstanding agreements (s. 11) to award damages, heretofore only recoverable in a Court of Law, and to make orders on two or more companies together (s. 14), and as to undue preference, provides for equal treatment of home and foreign merchandise in certain cases (s. 27), authorizes "group rates" (s. 29), and empowers dock and harbour companies to complain to the Commission that their port is placed at a disadvantage as compared with any other port (s. 30).

Other extensions of the section by the Act of 1888.

The 3rd section of the Act of 1854 authorized the Court of Common Pleas to issue a writ of injunction restraining any company from further continuing any violation or contravention of the Act and enjoining obedience to the same; the 6th section of the Act of 1873 transferred this jurisdiction to the Railway Commissioners; and the 8th section of the Act of 1888 transfers to the Railway and Canal Commission all the jurisdiction of the Railway Commissioners, "whether under the Regulation of Railways Act, 1873, or any other Act, or otherwise," the other sections of the Act of 1888 adding power to award damages and other powers as above mentioned. The section cannot be set up in answer to an action to recover charges for carriage (*mn*).

Enforcement of the section by injunction.

It is clear that section 2 of the Act of 1854 applies to a company acting as carriers upon their own line, and is not limited to a company acting as merely owners of a line (*n*), and the amending enactments have the same application.

Application of the section to company as carriers.

### (b) *Traffic Facilities.*

With regard to traffic facilities the 2nd section of the Railway and Canal Traffic Act, 1854 (*ante*, p. 482), enacts that—

"Every railway company, canal company, and railway and canal company, shall according to their respective powers, afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles."

(*mn*) *L. & Y. R. Co. v. Greenwood*, L. R. 21 Q. B. D. 215.

(*n*) See per Lord Selborne, C., in *South Eastern L. Co. v. Railway Commissioners*, 11 B. & D. 559.

8. Traffic facilities, &c. (Railway and Canal Commission).

Powers.

The limitation that the affording of the facilities is to be according to the powers of the company—an expression which of itself includes powers of any kind—must be read in connection with section 11 of the Railway and Canal Traffic Act, 1888, by which—

Effect of agreement.

“Nothing in any agreement, whether made before or after this Act, which has not been confirmed by Act of Parliament or by the Board of Trade or by the Commissioners under the Regulation of Railways Act, 1873, or this Act, shall render a company unable to afford or shall authorise such company to refuse such reasonable facilities for traffic as may in the opinion of the Commissioners be required in the interests of the public, or shall prevent the Commissioners from making or enforcing any order with respect to such facilities.”

Except as altered by this section, the limitation exists, and the Commissioners have clearly no jurisdiction to order a company to exceed its statutory powers, though they would seem to have *jurisdiction* to order unremunerative facilities to be given by a company having funds to defray the expenses of them. The statutory powers of a company must be sought for in its special acts, as well as in the 65th section of the Companies Clauses Act, 1845, and the 86th and other sections of the Railways Clauses Act, 1845.

“Reasonable facilities.”

From the preamble to the Act of 1854, from the definition of traffic in the interpretation clause, from the absence of any provision similar to sect. 89 of the Railways Clauses Act, 1845, it seems that the statute imposes upon the companies larger obligations than those of carriers at common law, and does not merely provide a new remedy for the infringement of common law obligations. The Commissioners would therefore seem to have jurisdiction over such matters as the number of carriages, the number, time of departure (o), and even speed of trains, it being a matter of administration for them to consider whether the facilities required in each particular case be reasonable under the circumstances or not. At common law, however, a carrier cannot be compelled to run more conveyances than he chooses, and except so far as compellable under this statute and 7 & 8 Vict. c. 85, s. 12 (p), a railway company may abstain altogether from carrying (q).

Jurisdiction of Commissioners to compel the running of a train.

The Court of Common Pleas indeed (r) declined to compel a company to carry coal; but neither the important question, whether the peculiar statutory jurisdiction of the Court would extend to a compelling to carry, nor the important distinction between compelling to carry absolutely and compelling to carry in cases where the Court should deem the compelling to be reasonable, seem to have been sufficiently brought before the Court.

(o) See as to the number and timing of trains per Cockburn, C.J., in *South Eastern R. Co. v. Railway Commissioners*, 3 Nev.

Trans.”

(q) See *Johnson v. Midland R. Co.*, 4 Exch. 67, Chap. XVI., Sect. 1, post.

(r) *Grindley v. North Eastern R. Co.*,

It has been held by the Court of Appeal that the Commissioners have not jurisdiction to order a company to provide a new station (s), or to order particular works at any existing station to be executed according to a particular plan, but that they have jurisdiction to order facilities for receiving the traffic at any existing station, notwithstanding that the execution of the order may necessitate some structural alterations of such station. This was decided in *South Eastern R. Co. v. Railway Commissioners* (t), in which an order of the Commissioners in reference to Hastings station was held good as to booking office and cattle accommodation, bad only because wrongly framed as to extension of platform and waiting rooms, and bad as to refreshment rooms and covering over of platforms and station yard, because refreshment rooms are not "facilities," and the covering over had been directed by the Commissioners not for the accommodation of passengers as such, but for the accommodation of these many invalid passengers frequenting Hastings station.

Jurisdiction of Commissioners to order works at stations, &c.

Refreshment Rooms, &c.

An important question might arise as to how railway companies may, by public notice, limit their business to the carriage of particular articles and refuse to carry explosives, coal, animals, or any other kind of traffic. The Railways Clauses Act, s. 105, expressly frees the companies from the obligation to carry explosives, and the Act of 1854, though passed after the Railways Clauses Act, seems to be too general in its terms to work an implied repeal of the exemption (u). As to all other articles, and as to passengers and animals, it would seem that the Commissioners have jurisdiction to compel the companies both to run trains for the purpose of carrying them, and to receive them when offered for carriage. It would be for the Commissioners to consider whether what any applicant wished to be done by a company in this respect was "reasonable." That other companies did what was required of the defendant company by the complainant would be some evidence of the facilities required being "reasonable." That the company complained of could not afford the required facilities at a profit would be strong evidence that the facilities were "unreasonable." But the decision would rest with the Commissioners, and if they granted an injunction, it is hard to see how it could be set aside on appeal.

Jurisdiction of Commissioners to compel the carriage of goods.

Evidence of required facilities being "reasonable."

The Railway Commissioners held that where a company actually carry, they must charge within the maximum, although they have given notice that they do not act as carriers, and the Court of Session

Where company carry they must charge within maximum, although they do not act as carriers.

(s) In *Newington Local Board v. N. E. R. Co.*, 3 Nev. & Mac. 306, and *Harris v. L. & S. W. R. Co.*, ib. 381, heard before the *South Eastern* case had been thus decided. the commissioners had asserted this

new stations upon the facts.

(t) *South Eastern R. Co. v. Railway Commissioners*, 3 Nev. & Mac. 506; L. R., 6 Q. B. D. 586; 50 L. J., Q. B. 201; 41 L. T. 203.

8 *Large Facilities, &c. (Railway and Canal Co. v. Great North of Scotland R. Co., 3 Nev. & Mac. 205.)*

in Scotland hold this decision to be correct (*x*), but it has been said that the decision is perhaps properly interpreted as meaning only that if it be reasonable that a company shall act as carriers of any particular goods they must so act, notwithstanding any notice on their part that they will not carry those goods (*y*).

Approach to station.

The Commissioners cannot compel a company to improve an approach to a station, even though the approach should be entirely on their own land (*z*), but they could compel a company to erect a footbridge over their railway at a station, though the Railway Commissioners dismissed an application for this purpose on the ground that the bridge applied for was not a due and reasonable facility under the circumstances (*u*).

Footbridge.

Exceeding maximum, not withholding facilities.

Merely to exceed maximum fares is not to withhold reasonable facilities (*b*). So it was held by the Court of Appeal in *Brown's Case* (*b*), in which, however, the Court seemed to think, that if the excess were such as to prevent traffic, it would amount to a refusal to afford reasonable facilities for it. The Railway Commissioners also, in the *Distington Case* (*c*), were "clearly of opinion," both on principle, and on their view of the above *dicta* in *Brown's Case*, "that a refusal to receive and carry traffic except on terms which a company are not warranted in exacting, is a denial of reasonable facilities within the meaning of the Act, and is also, when the sender of the traffic is thereby injured or inconvenienced in the conduct of his business and undue prejudice and disadvantage to such sender," which prejudice, the Commissioners seemed to think, would be more likely to happen to goods than passenger traffic. If these views be correct, they might apply as well to an excessive charge within the maximum as to an excessive charge beyond it (see p. 447). But it is submitted that the term "facilities" does not include either fares for passengers or rates for goods of any kind whatever, on the ground that the legislature would have given the jurisdiction to interfere with prices by more express words, and that the terms "undue or unreasonable prejudice or disadvantage," following as they do the term "undue preference," have reference only to the case where one customer is prejudiced as compared with another.

*Brown's case.*

Storage of coal.

The storage of coal at a station appears to be a "facility," but the Court of Common Pleas was divided upon this point (*d*).

(*x*) *Murder & Commercial Co. v. Great North of Scotland R. Co.*, 3 Nev. & Mac. 205.

(*y*) Per Bramwell, L.J., in *Brown v. G. W. R. Co.*, 3 Nev. & Mac., at p. 535.

(*z*) *South Eastern R. Co. v. Ry. Commissioners*, L. R., 6 Q. B. D. 506, per

*W. R. Co.*, 4 R. & C. T. C. 87.

(*b*) *Brown v. G. W. R. Co.*, L. R., 7 Q. B. D. 182; 50 L. J., Q. B. 483; 45 L. T. 208; 29 W. R. 901—C. A., affirming Field and Manisty, JJ.

(*c*) *Distington Iron Co. v. L. & N. W. R. Co.*, 11 Q. B. D. 1000.

Refreshment rooms are clearly not "facilities" (e), and for a similar reason the term would not include foot-warmers or other comforts. Smoking carriages are not *prima facie* facilities, but the neglect to provide them might possibly cause such obstruction to general passenger traffic as to cause them to become so. The 20th section of the Regulation of Railways Act, 1868, which obliges all companies "in every passenger train where there are more carriages than one of each class to provide smoking compartments for each class of passengers, unless exempted by the Board of Trade," cannot, it is contended, be enforced by the Commissioners.

Refreshment rooms, smoking carriages, &c.

Where any *special* Act requires traffic facilities, or stations, roads, or other similar works, or "otherwise imposes on a company any obligation in favour of the public or any individual," the 9th section of the Railway and Canal Traffic Act, 1888, newly confers upon the Commission the like jurisdiction to hear and determine a complaint of a contravention of the enactment as they have to hear and determine a complaint of a contravention of sect. 2 of the Act of 1854.

Facilities required by special Acts.

(c) *Undue Preference.*

"Undue preference" is prohibited by the 2nd section of the Act of 1854 (set out at length, p. 482, ante) as follows:—

Prohibition of undue preference by Act of 1854.

"No company shall make or give any undue or unreasonable preference to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any company subject any particular person or company or any particular description of traffic, to any undue or unreasonable disadvantage in any respect whatsoever."

This enactment (which cannot be set up in answer to an action to recover charges for carriage (f)), is based on the "equality clause" (ante, p. 466), but differs from it in prohibiting undue preference in any respect *whatsoever*, whereas the equality clause prohibits any preference *in charges* of traffic passing only over *the same portion* of a line under the same circumstances as that of the party complaining.

Comparison of Act of 1854 with Equality Clause.

What is an undue preference under sect. 2 of the Act of 1854 must always be a question of fact, as has been pointed out in the Court of Common Pleas (g), and by the Railway Commissioners (h). The Court, the Railway Commissioners, and now the Railway and Canal Commission may be perhaps looked upon as three sets of special juries to whom the decision of these questions of fact has been successively committed by the Legislature, the opinion of the majority prevailing, and there being no obligation to deliver separate judgments or even to give reasons.

Undue preference a question of fact.

(e) See the *Hastings case*, ante.  
(f) *T. A. V. R. Co. v. Greenwood*, L. R.

1 U. P. 243.  
(h) *Diphys Carsons Slate Co. v. Festiniog*



*s. Traffic Facilities, &c. (Railway and Canal Commission).*

The decisions of the Court of Common Pleas and of the Railway Commissioners have been already tabulated (*ante*, p. 471 and p. 476). The 27th section of the Railway and Canal Traffic Act, 1888, expressly throws upon the companies the burden of proving that any lower charge or difference in treatment does not amount to an undue preference, and it may perhaps be expected that the Railway and Canal Commission will hold preferences to be justified by the same and similar reasons to those which satisfied their predecessors. These are shortly that a preference is justified by a larger traffic guaranteed (*i*) by greater expense of carriage (*k*), or by certain natural advantages of position (*l*), but not by the desire to introduce a particular kind of goods into a particular district (*m*). Great stress too has been laid upon a "competition of interests" by the Railway Commissioners, and the preventing of such interests being favoured in one locality more than another (*n*).

*Amendments of the Act of 1854 as to undue preference.*

The Act of 1873 merely extended the undue preference clauses of the Act of 1854 to through rates, but the Act of 1888 has made amendments of very great importance. By sect. 28 all enactments as to undue preference are extended to goods carried by sea, by sect. 29, which is of course permissive only, and not imperative, "group rates" are expressly authorized, "provided that the distances shall not be unreasonable and that the group rates charged and the places grouped together shall not be such as to create an undue preference"—a proviso which leaves the law very much as it was:—and by sect. 30 any port or harbour authority or dock company having reason to believe that any railway company is placing their port, &c., at an undue disadvantage as compared with any other port, &c., to or from which traffic is or may be carried by means of the lines of the railway company, have a *locus standi* to apply to the Commissioners for redress.

But by far the most important section is the 27th, which is as follows:—

*Burden of proof on company to show that preference is not undue.*

"27.—(1.) Whenever it is shown that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than they charge to other traders, or classes of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company.

*Consideration whether preference necessary to secure traffic.*

"(2) In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the court having jurisdiction in the

(i) See *Nicholson v. Great Western R. Co.*, 5 C. B., N. S. 386; *Broughton v. Great Western R. Co.*, 4 R. & C. T. C. 191.

(k) See *Nitshill v. Caledonian R. Co.*, 2 Nev. & Mac. 30.

(l) *Harris v. Cockermouth and Workington*

*R. Co.*, 3 C. B., N. S. 893.

(m) *Oxley v. N. E. R. Co.*, 26 L. J., C. P. 120.

(n) See *Richardson v. Midland R. Co.*, 4 R. & C. T. C. 1.

matter, or the Commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make, nor shall the court, or the Commissioners, sanction any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services.

No distinction between home and foreign merchandise.

"(3.) The court or the Commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway."

Commissioners may prohibit higher charge for less distance.

The 1st and 3rd sub-sections expressly apply to merchandise traffic only, and so does the proviso of the 2nd sub-section. Whether the rest of the 2nd sub-section applies to passenger traffic also, will be presently considered.

Whether s. 27 applies to passenger traffic.

It is conceived that sub-sect. 1, in throwing upon a company the burden of proving that a preference is not undue, merely expresses the existing law (o); but the point is doubtful.

The burden of proof.

The direction of sub-sect. 2 that the Commissioners may take into consideration whether a lower charge is necessary to secure the traffic, which had led to much litigation (p), appears to have been suggested by *Evershed's case* (q), in which the Courts of Law upon "the equality clause," and the *Burton Brewers' case* (r), in which the Railway Commissioners, upon the 2nd section of the Traffic Act, declined to allow the question of competition to influence them. The important qualification for "the interests of the public" is no doubt pointed at securing to the public the benefits of competition amongst many freighters of the same kind of traffic. Unless a company can show affirmatively that preferential rates secure this benefit to the public, the Commissioners appear to be excluded from considering whether or not the traffic will be lost by a discontinuance of any preferential rates complained of.

Consideration whether preference necessary to secure traffic.

The proviso that "no railway company shall make, nor shall the Court or the Commissioners sanction any difference in the tolls, rates, or charges made for, or any difference in the treatment of home and foreign merchandise, in respect of the same or similar services," is limited in its application to cases coming within sub-sect. 2, and does not absolutely enjoin equal mileage rates for home and foreign merchandise.

Home and Foreign merchandise.

It is believed that the important question, to what extent preferential charges for foreign merchandise are justified, was in no case

(o) See *Garlon v. Bristol and Exeter R. Co.*, 28 L. J., C. P. 639.

(q) *Ante*, p. 469.

(p) See *The Denaby Main case*, *ante*, p. 467 and p. 476.

(r) *Thompson v. L. & N. W. R. Co.*, 2 Nov. & Mac. 115, and p. 478, *ante*.

*s. 2 Traffic Facilities, &c. (Railway and Canal Commission).*

brought before the Railway Commissioners, and further that in no case have either the Court of Common Pleas or the Railway Commissioners had to consider the interests of the general public apart from those of competing traders.

Whether sub-s. 2 applies to passenger traffic.

The proviso of sub-sect. 2 applies in terms to merchandise traffic only, but the remainder of the sub-section is not so limited. It is conceived, however, from the use of the word "rates," and the general scope of the whole section, that sub-sect. 2, as well as the other sub-sections, applies to merchandise traffic only.

Higher charge for less distance.

The 3rd sub-section, in empowering the Commission to prohibit a higher charge for a less distance, merely expresses the existing law (rr).

Damages for undue preference.

By sect. 12 of the Railway and Canal Traffic Act the Commissioners are newly empowered to award, in addition to or in substitution for any other relief, damages to any complaining party, but it is expressly provided by the same section that "such damages shall not be awarded unless complaint has been made to the Commissioners within one year from the discovery by the party aggrieved of the matter complained of," and also by sect. 13, that—

No damages where rates published.

"13. In cases of complaint of undue preference no damages shall be awarded if the Commissioners shall find that the rates complained of have, for the period during which such rates have been in operation, been duly published in the rate books of the railway company kept at their stations in accordance with section fourteen of the Regulation of Railways Act, 1873 (s), as amended by this Act (t), unless and until the party complaining shall have given written notice to the railway company requiring them to abstain from or remedy the matter of complaint, and the railway company shall have failed, within a reasonable time, to comply with such requirements in such a manner as the Commissioners shall think reasonable."

#### (d) *Through Traffic, Rates and Routes.*

The second section of the Act of 1854 imposed upon every railway company the obligation of forwarding through traffic without unreasonable delay, and the 3rd section of the same Act gave power to the Court of Common Pleas to enforce this obligation. The jurisdiction of the Court of Common Pleas was transferred to the Railway Commissioners by the Act of 1873, with this important addition, that the through traffic must be forwarded at through rates, and the important distinction, that whereas under the Act of 1854 any member of the public had the power to enforce the obligation in respect of through traffic, it was only the sending company which

(rr) The 3rd sub-section was suggested by section 4 of the United States "Inter-State Commerce Act" of 1887, by which it is unlawful for any common carrier to charge or receive for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a

longer distance over the same line in the same direction, the shorter being included within the longer distance, &c.

(s) See ante, p. 452, and vol. II.

(t) See section 34 of this act by which rates for traffic received or delivered at places other than stations must be published.

had a *locus standi* to apply for a through rate, but this distinction has been, it will be seen, in a great measure done away with by the 25th section of the Act of 1888, which re-enacts, with amendments, the 11th section of the Act of 1873, as follows :—

“Whereas by section 2 of the Railway and Canal Traffic Act, 1854, it is enacted that every railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, or shall subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway, or canal or railway and canal communication, or which have the terminus station or wharf of the one near the terminus station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf :

“And whereas it is expedient to explain and amend the said enactment :

“Be it therefore enacted, that—

“Subject as hereinafter mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates); [and also the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any person interested in through traffic, of such traffic at through rates : Provided that no application shall be made to the Commissioners by such person until he has made a complaint to the Board of Trade under the provisions of this Act as to complaints to the Board of Trade of unreasonable charges, and the Board of Trade have heard the complaint in the manner herein provided (y)].

Through rates

At request of any person.

“Provided as follows :

- “(1.) The company or person requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company, stating both its amount and the route by which the traffic is proposed to be forwarded; and when a company gives such notice it shall also state the apportionment of the through rate. [The proposed through rate may be per truck or per ton (z)] :
- “(2.) Each forwarding company shall, within ten days, or such longer period as the Commissioners may from time to time by general order prescribe, after the receipt of such notice, by written notice inform the company or persons requiring the traffic to be forwarded, whether they

Notice of proposed rate.

To truck rates.

Notice of objection within prescribed time.

(y) The words within brackets were not in s. 11 of the act of 1873. As to complaints to Board of Trade, see s. 31 of the

act, ante, p. 449.

(z) The words within brackets were not in s. 11 of the act of 1873.

<p>ries, &amp;c. (Revenue and Canal Commission).</p> <p>Operation of rate.</p> <p>Reference to Commissioners.</p> <p>Fixing of rate.</p>	<p>... of the objection :</p> <p>“(3.) If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration :</p> <p>“(4.) If an objection to the rate or route has been sent within the prescribed period, the matter shall be referred to the Commissioners for their decision :</p> <p>“(5.) If an objection be made to the granting of the rate or to the route, the Commissioners shall consider whether the granting of a rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly [or fix such other rate as may seem to the Commissioners just and reasonable (a)] :</p>
<p>Fixing of rate where required by a person.</p>	<p>[“(6.) Where, upon the application of a person requiring traffic to be forwarded, a through rate is agreed to by the forwarding companies, or is made by order of the Commissioners, the apportionment of such through rate, if not agreed upon between the forwarding companies, shall be determined by the Commissioners (b)] :</p>
<p>Date of rate.</p>	<p>“(7.) If the objection be only to the apportionment of the rate, the rate shall come into operation at the expiration of the prescribed period, but the decision of the Commissioners, as to its apportionment, shall be retrospective ; in any other case the operation of the rate shall be suspended until the decision is given :</p>
<p>Consideration of special expenses, &amp;c.</p>	<p>“(8.) The Commissioners, in apportioning the through rate, shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof :</p>
<p>Restriction upon lowering of rates.</p>	<p>“(9.) It shall not be lawful for the Commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit or any other line of communication between the same points, being the points of departure and arrival of the through route.</p>
<p>Steam vessels</p>	<p>“Where a railway company or canal company use, maintain, or work, or are party to an arrangement for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, the provisions of this section shall extend to such steam vessels, and to the traffic carried thereby.</p>
<p>Costs.</p>	<p>“When any company, upon written notice being given as aforesaid, refuses or neglects without reason to agree to the proposed through rates, or to the route, or to the apportionment, the Commissioners, if an order is made by them upon an application for through rates, may order the respondent company or companies to pay such costs to the applicants as they think fit.”</p>

It is next provided by sect. 26, that—

“Subject to the provisions in the last preceding section contained, the Commissioners shall have full power to decide that any proposed through rate is due and reasonable, notwithstanding that a less amount may be allotted to any forwarding company out of such through rate than the maximum rate such company is entitled to charge, and to allow and apportion such through rate accordingly.”

(a) This power was not given by s. 11 of the act of 1873.

(b) This subsection, which is conse-

quential upon the amendment already made, as pointed out in note (p), was not in s. 11 of the act of 1873.

## 9. *Government Purchase of, and Revision of Tolls on, Passenger Railway.*

*9. Government Purchase and Revision of Tolls*

A railway company is not entitled to an absolute and perpetual property in its line. If the railway be a "passenger railway," that is, if one-third or more of its revenue be derived from passenger traffic (c), the Government may purchase it in twenty-one years after the passing of the special act. This is the short effect of a statute passed in 1844 (7 & 8 Vict. c. 85); and although it will be seen that this statute has little, if any, practical value, it is desirable to notice its terms in this chapter, as they form an important qualification of the right of property which a railway company would otherwise have in its line. The Act of 1844 enacts as follows:—

7 & 8 Vict. c. 85.

If, after the end of 21 years from the passing of any railway act of 1844 or any subsequent session, the clear annual profits divisible upon the subscribed and paid-up capital stock of such railway, upon the average of the 3 then last preceding years, shall equal or exceed 10% per cent., the Lords of the Treasury may, upon giving 3 months' notice to the company, revise the scale of tolls, fares and charges limited by the act relating to the railway, and fix such a new scale as shall be likely to reduce the divisible profits to 10% per cent. (d); but no revised scale can take effect unless accompanied by a guarantee that the divisible profits, in case of any deficiency therein, shall be annually made good to the said rate of 10% per cent.; and a revised scale may not be again revised, or the guarantee withdrawn, otherwise than with the consent of the company, for the further period of 21 years (7 & 8 Vict. c. 85, s. 1).

Revision of tolls.

Government revision of tolls.

Or the Treasury, at the end of the said period of 21 years (whatever be the rate of divisible profits), may, upon giving 3 months' notice to the company, purchase any such railway, upon payment of a sum equal to 25 years' purchase of the annual divisible profits, or, in certain cases, at a price to be fixed by arbitration; but no option to purchase can be exercised whilst a revised scale of tolls is in force:

Government purchase.

(Sect. 2.)

The above-mentioned option of revision or purchase is not applicable to any railway authorized to be made by any act passed previous to the session 1844 (e), or to any new branch of such railway if less than 5 miles in length. It is also provided, that the option to pur-

Saving for railways existing in 1844.

(c) 7 & 8 Vict. c. 85, s. 25. There appear to be fifteen railway companies whose railways carry passengers, but who do not derive one-third of their revenue from passenger traffic.

(d) Since 1845 a clause has been inserted in every special act authorizing a

future revision and alteration, under the authority of Parliament, of the maximum rates.

(e) More than 2,300 miles of railway were sanctioned before 1844, and are therefore excluded from the provisions of the act.

*B. Government  
Purchase and  
Revision of Tolls.*

Powers of act  
cannot be exer-  
cised without a  
further act.

Purchase of  
single railway.

Revision of tolls  
by Board of  
Trade, under  
special acts.

G. W. R. Co.

L. & Y. R. Co.

Conclusions of  
Royal Commis-  
sion as to  
Government  
purchase.

chase any new branch shall not be exercised without including the railway also: (Sect. 3.)

But inasmuch as it was not the intention of the act that the powers of revision should be employed to sustain an undue competition against independent companies, it is further provided, that no notice of revision or purchase can be given under the above-mentioned powers until an act of Parliament has been obtained for authorizing the said guarantee, or the levy of the purchase-money, and for determining the manner in which the option shall be exercised; and 3 months' notice of the intention to apply for such act of Parliament must be given to the company affected thereby: (Sect. 4.)

It seems that the Government could purchase one railway, without being bound to purchase all railways.

In the case of the Lancashire and Yorkshire and of the Great Western Railway Company, the revision of tolls is specially provided for by an enactment operating in the case of the Lancashire and Yorkshire when the dividend reaches 8 per cent., and in the case of the Great Western when it reaches 6 per cent.

The Great Western Railway (West Midland Amalgamation) Act, 1863, 26 & 27 Vict. c. cxcviii, provides, by sect. 64, as follows:—

"If at any time hereafter the clear annual profits divisible upon the subscribed and paid-up capital stock of the United Company, upon the average of the three then last preceding years, shall equal or exceed the rate of six pounds for every hundred pounds of such paid-up capital stock, it shall be lawful for the Board of Trade, upon giving to the company three calendar months' notice in writing so to do, to revise the scale of tolls, fares and charges authorized to be taken or levied by the United Company, and to fix such new scales of tolls, fares and charges applicable to such different classes and kinds of passengers, goods and other traffic on the railways belonging to the United Company as, in the judgment of the said Board, assuming the same quantities and kinds of traffic to continue, shall be likely to reduce the said annual divisible profits to the said rate of six pounds in the hundred, such revised tolls, fares and charges not being in any case less than the tolls, fares and charges which the Great Western Company were authorized to demand and receive by the Great Western Railway Amendment and Extension Act, 1847."

The 78th section of the Lancashire and Yorkshire and East Lancashire Amalgamation Act, 1859 (22 & 23 Vict. c. cx), is precisely similar to the above, except that for the words "six pounds" must be read eight pounds, and for the words "Great Western Railway Amendment and Extension Act, 1847," must be read "on the 1st January, 1850."

It will be observed that the twenty-one years period fixed by the Act of 1844 (7 & 8 Vict. c. 83) expired in 1865. The Royal Commission appointed in that year reported in 1867 as follows:—

"The question of Government purchase deserves full inquiry in a broad point of view, and the expiration of the period fixed in the Act of 1844 affords a good opportunity for inquiring, with the help of the experience which has now

been acquired, whether a change of system is desirable. The transfer of the railways to the State has been recommended by several witnesses, partly for the sake of its direct financial advantages, partly as affording the means of introducing an improved system of management. The expectation of direct financial advantages is based upon the assumption that as the Government can borrow money on more favourable terms than any other parties, this difference in the rate of interest would either be available as profit to the State or would afford an opportunity for the reduction of rates. It is possible that a profit from this source might be obtained if Government could buy the railways at twenty-five years' purchase of their average net profits; but at present, unless the profits amounted to ten per cent. on the capital expended, an additional amount would have to be paid, to be fixed by arbitration, and it is probable that any arbitrator between the Government and private companies on such a question would make a very large allowance for future increase of profits. There being also above 2,300 miles (including some of the most important lines in the country) not subject to the Act of 1844, the purchase of these lines, which would be absolutely necessary to carry out the scheme, could only take place with the consent of the proprietors, and this could only be obtained by the offer of liberal terms. It is probable, therefore, that, in practice, much of the assumed profit would disappear in the extra price above the assumed twenty-five years' purchase which would have to be paid. In addition to the diminution of assumed profit arising from this cause, it must not be forgotten that as the Government would have to enter the market to borrow £400,000,000 or £500,000,000 to carry out the operation, the terms upon which this could be raised would in all probability be materially affected. The depressing effect upon public securities would be equally felt, whether the Government conducted the whole operation at once, or whether it came into the market year after year to repeat an operation of £25,000,000 a year; and it is not easy to foresee what the price of consols would be under the proposed addition of £500,000,000 to the National Debt. It is therefore probable that the Government would have to exchange the income of the railway companies for an equivalent income in consols to avoid being called upon to make cash payments for the purchase-money, which would have to be paid out of money borrowed in consols. It cannot therefore be expected that, under the provisions of the present law, much profit could result to the State from the transaction as a financial operation."

After discussing at some length a proposed plan for "leasing the railways in groups" when purchased, and pointing out that such a plan for various reasons would not be likely to lead to improved management, the Report pronounced that it was "inexpedient *at present* to subvert the policy which had hitherto been adopted of leaving the construction and management of railways to the free enterprise of the people, under such conditions as Parliament might think fit to impose for the general welfare of the public (f). In like

(f) Those interested in the question of Government purchase are recommended to study the separate reports of Sir R. Hill and Mr. Monsell, now Lord Enly, *contra*. The latter dissented as to Ireland only. See also the whole subject carefully dis-

cussed, with statistics and a map showing a "proposed arrangement of the Railways System into Districts," in a work by Mr. A. J. Williams, called "The Appropriation of Railways by the State," published in 1889. Mr. Williams strongly advocates



9. *Government  
Purchases and  
Division of Tolls*

Conclusions of  
Amalgamation  
Committee as to  
Government re-  
vision of tolls.

manner the Joint Select Committee of 1872 did not think that any *present* necessity existed for entering upon the "full and prolonged inquiry which the question of Government purchase would demand." And with regard to Government revision of rates and fares, this latter committee reported as follows :—

"Equal mileage rates are inexpedient. It is impracticable to establish any standard for the revision of rates and fares founded on cost and profit. Immediate reduction of rates and fares, even when practicable, cannot be looked upon as permanently effectual. Periodical revision of rates and fares is impracticable without some standard of revision. Revision of rates and fares founded on a limitation of dividend to a fixed amount is undesirable in the interest of the public. Revision of rates and fares founded on a division of profit above a certain amount between the companies and the public in this country is attended with great, if not insuperable, difficulties."

Re-classification  
under Act of  
1888.

The re-classification of traffic and re-arrangement of rates under the Act of 1888 have been already considered (ante, Sect. 4).

10. *Conveyance  
of Mails.*

#### 10. *Obligation to convey her Majesty's Mails.*

Statutes.

The obligations imposed on railway companies to convey the mails are contained in 1 & 2 Vict. c. 98; 7 & 8 Vict. c. 85, s. 11; 10 & 11 Vict. c. 85, s. 16; 31 & 32 Vict. c. 119, ss. 36, 37, and 30 & 37 Vict. c. 48, ss. 18—20 (g); and by a clause always inserted in each special railway act, the company are made liable to the provisions of these general acts.

Extension of  
statutes to con-  
veyance of mails  
by steam vessels.

The above-mentioned general acts are applicable to railways whether the carriages used are impelled by steam, locomotives or stationary engines, or animal or other power (h); and no company can make bye-laws repugnant to these acts (i). Moreover, all provisions contained in any act with respect to the conveyance of mails by railway, extend, so far as they are applicable to the conveyance of mails by steam vessels, to the steam vessels used or worked by

Government purchase, being of opinion that "if the public can only be brought to realize their just claims upon the State in respect of this great national property, and the absolute infatuation of allowing the existing monopolies to continue, an expression of the national will must follow, which it will be impossible to disregard." (Preface, p. xi.) The purchase of railways, he thinks, must include that of canal navigation (p. 26, n); and he seems to establish that Government ownership works

well in Belgium, where (see p. 112) the charge for carrying raw silk for sixty-nine miles would be 9s. 3d. per ton, whereas in England it appears to be about £2 : 10s. per ton. The Belgian plan is to diminish the charge per mile in proportion to the length of the journey beyond the first twenty-two miles.

(g) See these statutes at length in vol. II.

(h) 1 & 2 Vict. c. 98, s. 1.

(i) Id., s. 11.

railway companies for the purpose of carrying on a communication between any towns or ports (*k*).

The Postmaster-General may by notice (*l*) require that the mails be forwarded on a railway, either by the ordinary or special (*m*) trains, at such hours or times in the day or night as the Postmaster-General shall direct, together with the guards in charge thereof (or without such guards (*n*)), and any other officer of the Post-Office; and thereupon the company are required, at their own cost, to provide sufficient carriages and engines for the conveyance of the mails to the satisfaction of the Postmaster-General, and to take up, and convey, by such ordinary or special trains or otherwise, as need may be, all mails or post letter-bags, as shall be tendered to them by any officer of the Post-Office; and also to take up and convey in the carriages carrying such mails, &c., the guards in charge thereof, and any other officers of the Post Office; and to take up and leave such mails, &c., guards and officers, at such places on the line, on such days, at such hours in the day or night, and subject to all such reasonable regulations and restrictions, as to speed, stoppages and times of arrival, as the Postmaster-General shall from time to time direct.

Postmaster-General may require mails to be conveyed at any time.

The Postmaster-General may also require that the whole of the inside of any carriage shall be exclusively appointed for the purpose of carrying the mail (*o*); and that separate carriages be provided for the purpose of sorting letters (*p*); also that mail carts shall be conveyed on the trucks used on the railway (*q*), or that a mail-guard shall be conveyed, with bags of a specified weight, by any trains other than a mail train, upon the same conditions as any other passengers (*r*). And the servants of the company are required to observe all such reasonable regulations respecting the conveyance, delivering, and leaving of mails and post letter-bags, guards and officers of the Post Office, mail carts and carriages as the Postmaster-General, or such officer of the Post Office as he shall nominate, shall, in his discretion, from time to time make. But it is provided, that no such officer shall interfere with the engineer having the charge of any engine used upon the railway, and that any cause of complaint shall be stated to the conductor, or other officer having charge of the train, or to the chief officer at any station (*s*), and the

Reservation of carriage for mail service.

(*k*) 36 & 37 Vict. c. 43, s. 20.

(*l*) The notice, which is not obligatory see 36 & 37 Vict. c. 43, s. 18), may be delivered to any director, secretary, or clerk, or be left at any station on the railway. 1 & 2 Vict. c. 93, s. 15.

(*m*) The postmaster-general may require that the whole of such special train shall be appropriated to the service of the post office exclusively of all other traffic except such as he may sanction, the remuneration

to be settled as prescribed by 1 & 2 Vict. c. 93, s. 6; 31 & 32 Vict. c. 119, s. 36.

(*n*) 10 & 11 Vict. c. 85, s. 16; 36 & 37 Vict. c. 43, s. 18.

(*o*) 1 & 2 Vict. c. 93, s. 2.

(*p*) *Id.* s. 3.

(*q*) *Id.* s. 4.

(*r*) 7 & 8 Vict. c. 85, s. 11, post, vol. II.; and see *R. v. Irish South Eastern R. Co.*, 1 Ir. L. R., N. S. 20.

(*s*) 1 & 2 Vict. c. 93, s. 5.

*In consequence  
of Mails*

Liability for  
negligence to  
Post Office  
servants.

Officer of Post  
Office need not  
accompany.

Bond.

Remuneration to  
be paid for con-  
veying the mails.

Requirement of  
additional ser-  
vices.

company are liable for negligence to servants of the Post Office sustaining injury on a journey (*l*). The Postmaster-General may require, in the manner prescribed by the before-mentioned act, 1 & 2 Vict. c. 98, that any mails and post letter-bags shall be conveyed by any railway company on their railway, pursuant to the said act, notwithstanding any officer of the Post Office shall not be sent with the same or in charge thereof (*u*). If the company fail to perform any of the duties imposed upon them by 1 & 2 Vict. c. 98, they are liable to forfeit 20*l*. for every offence (*v*), irrespective of their liability under the bond, which the Postmaster-General may, if he think fit, require any railway company to enter into. The form of this bond, and the sum in which it is taken, is in the discretion of the Postmaster-General, and it must be renewed from time to time whenever it becomes forfeited, or when the Postmaster-General shall require it to be renewed (*y*). The condition of the bond requires the company to perform all acts, by 1 & 2 Vict. c. 98, required of the company (*z*).

The remuneration to be received by railway companies for the performance of the foregoing services is ascertained in the following manner:—First, it is provided, that the company shall be entitled to receive such reasonable remuneration as shall (either prior to or after the commencement of the services) be agreed on between the Postmaster-General and the company (*u*); or, in case of difference, then such remuneration as shall be determined by two arbitrators, one to be named by each party; and if such arbitrators cannot agree, then the amount is to be ascertained by an umpire, appointed by the arbitrators previously to their entering upon the inquiry (*b*). The arbitrators are to be appointed by each party within fourteen days after notice from the other, or, in default of such appointment, the arbitrator of the party giving notice may name the other arbitrator; and the arbitrators are required to make their award twenty-eight days after their appointment, or otherwise the matter shall be left to be determined by the umpire. If the umpire fails to make his award for twenty-eight days, then another umpire must be appointed by the arbitrators, and so toties quoties (*c*). Although an agreement or award, as to the amount of remuneration, may have been made, the Postmaster-General may require, by notice in writing, any addition to be made to the services performed; and in such case, and also in

(*l*) *Collett v. L. & N. W. R. Co.*, 20 L. J. Q. B. 411; 16 Q. B. 984.

(*u*) 1 & 2 Vict. c. 98, s. 16.

(*v*) 1 & 2 Vict. c. 98, s. 12.

(*w*) If this bond be not given or renewed for one month after it is required by the postmaster general, a penalty of 100*l*. per diem is incurred. 1 & 2 Vict. c. 98, s. 13.

When stock or exchequer bills may be deposited in lieu of a bond, see 6 & 7 Will. 4, c. 28, s. 1, and 1 & 2 Vict. c. 61.

(*z*) 1 & 2 Vict. c. 98, s. 18.

(*a*) *Id.* s. 6.

(*b*) *Id.* s. 16.

(*c*) *Id.* s. 18, vol. II.

case of a discontinuance of any part of the services, a fresh agreement must be entered into, or award made, to settle the amount of remuneration to be paid for such increased or diminished services; and compensation may also be awarded for any loss occasioned by the discontinuance or alteration of the services previously agreed to be performed (*d*). The services required by the Postmaster-General to be performed are not in any case to be suspended, postponed or deferred by reason of the amount of remuneration not having been fixed upon, or of an award not having been made (*e*).

After a contract or award settling the amount of remuneration has been in operation for three years, the railway company may require that the question of amount be again submitted to arbitration (*f*).

Renewal of  
arbitration.

Lastly, the Postmaster-General may determine the performance of any services, by giving the company six months' notice in writing (*g*); or absolutely put an end to any such services without notice; but in the latter event it is provided, that, if the services are put an end to without just cause, the company be compensated for all loss thereby occasioned (*h*).

Determination of  
contract by Post-  
master-General.

And it is enacted by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), sect. 18, that every company must convey by any train all mails tendered for conveyance, whether under charge of a guard or not, and notwithstanding the absence of a notice from the Postmaster-General. The same act directs (sect. 20) that where a railway company works steam vessels all statutory provisions with respect to the conveyance of mails by railway shall apply to the steam vessels so worked. The Railway and Canal Commission has jurisdiction to compel a company to convey mails (*i*).

Jurisdiction of  
Railway Com-  
missioners to  
compel convey-  
ance of mails.

### 11. *Conveyance of Post Office Parcels.*

*Conveyance of  
Post Office Parcels.*

The Post Office Parcels Act, 1882, 46 & 47 Vict. c. 74, provides for the carriage of parcels by railway under Treasury regulations on different conditions from ordinary postal packets. The railway remuneration is  $\frac{1}{3}$ ths of the gross receipts of the Post Office from the parcels, to be apportioned amongst the companies on the main principle that the share of each company "shall bear the same ratio to the whole sum divisible as that company's gross receipts from local and through parcels traffic for each half yearly period bear to the

Post Office  
arrangement  
with companies.

(*d*) 1 & 2 Vict. c. 98, s. 7.

(*e*) *Id.* ss. 6, 7, 17.

(*f*) *Id.* s. 16.

(*g*) *Id.* s. 8.

(*h*) *Id.* s. 9.

(*i*) *Postmaster-General v. Highland R. Co.*, 2 Nev. & Mac. 34; act of 1873, 36 & 37 Vict. c. 19, ss. 6, 18.

11. *Conveyance of  
Post Office Parcels.*

gross receipts from local and through parcels traffic of all the companies for the same period." This arrangement (to which all the principal railway companies, as scheduled to the act, were parties, and which applies (see s. 9, sub-s. 1 (c)), to all lines authorized after the passing of the act) is in force for 21 years after the Treasury Regulations first came into operation, *i.e.*, until 1907 (k).

Liability of  
companies.

The Act is printed at length in vol. II., but it may be mentioned here that by s. 7, sub-s. 5, the parcels are with regard to compensation to be treated as parcels sent by post, "and no company shall incur or be subject to any liability in respect of the conveyance or loss of or damage to any of the parcels," "but the railway companies shall take all reasonable care for the security of the parcels while under their charge."

12. *Conveyance  
of Troops.*12. *Obligation to convey her Majesty's Troops.*

The Cheap Trains Act, 1883, 46 & 47 Vict. c. 31, s. 6 (l), obliges every railway company (except in Ireland) to provide conveyance "for the purpose of moving by railway on any occasion of the public service" any of the officers or men in Her Majesty's Navy or Army, or "any officers or men of any police force." By this section every company "shall on the production of a route duly signed for the conveyance of the forces provide conveyance for them and their personal luggage (m), and also for any public baggage, stores, arms, ammunition, and other necessaries and things, whether actually accompanying the forces or not, at all usual times at which passengers are conveyed by the company, on such terms as may be agreed on between the railway company and the Secretary of State, Admiralty, or police authority." Subject to or in default of agreement the section specifies the terms as follows:—

## Fares

- (1) The passenger carriages are to have proper accommodation.
- (2) The fares are not to exceed certain proportions (specified in the section) of the fares charged to private passengers for the single journey by ordinary trains in the respective classes of carriages specified in the route.

## Families

- (3) The section applies "to such wives, widows, and children of members of the forces as are entitled to be conveyed at the public expenso in like manner as if they were part of the

(l) See London Gazette of 1st April, 1886.

(m) Requiring in terms more favourable to the Government s. 12 of 7 & 8 Vict. c. 85, repealed by s. 10 and schedule, but not applying to Ireland, whereby the

maximum fare was, for each officer 2d. per mile, and for each soldier and his wife or child above 12 years old, 1d. per mile

(n) See *Great Northern R. Co. v. Shephard*, 21 L. J., Ex. 111; 8 Exch. 30, post.

forces,” children under 3 to be conveyed free, and between 3 and 12 at half fares.

- (4) “One hundred weight of personal luggage shall be conveyed by the railway company free of charge for everyone conveyed under this section who is required by the route to be conveyed first-class, and half a hundred weight for every other person conveyed; and any excess of weight shall be conveyed at not more than two-thirds of the rate charged to the public for excess luggage.” Luggage.
- (5) Public baggage, &c. is to be carried at not more than 2*l.* per ton per mile, the forces to assist in loading and unloading it.
- (6) Gunpowder or other explosive substances not to be carried as a matter of obligation, except on terms agreed upon.

Where a private carrier in Ireland having a contract for his own benefit with the military authorities for stores produced a route to the company, and required the company to carry at the military rates under the act of 1844, but paid the ordinary rate upon the company requiring it, it was held that he could not recover the excess as money paid to his use (*o*).

Contract by company with private carrier.

The Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86, post, vol. II.), provides (sect. 16), that on occasion of emergency declared by Order in Council, a Secretary of State may empower any person he pleases to take possession of any railroad in the United Kingdom, and use the same for the Queen's service; and the National Defence Act, 1888, 51 & 52 Vict. c. 31, post, vol. II., provides (sect. 4) that, whenever an order for the embodiment of the militia is in force, military or naval traffic may be directed to have precedence over other traffic.

Power to Secretary of State to take possession of railroad in time of emergency.

### 13. *Obligation to provide Third-Class (Parliamentary) Trains.*

### 13. *Cheap Trains.*

By 7 & 8 Vict. c. 85 (commonly called the Cheap Trains Act), all passenger (*p*) railway companies, incorporated or obtaining an extension of their powers in or after 1844, were required to “provide for the conveyance of third-class passengers,” “by means of one train at the least,” to run upon their railway from one end to the other, “once at the least each way,” on every week-day, under certain conditions therein mentioned, of which the most important were that the fares were not to exceed one penny per mile, and that the trains were to take up and set down passengers (if required) at every

7 & 8 Vict. c. 85, s. 6.

(*o*) *Robertson v. Great Southern and Western R. Co.*, 7 Ir. R., C. L. 252.

(*p*) A “passenger railway” is, by sect. 25, a railway “upon which one-third or more

of the gross annual revenue is derived from the conveyance of passengers by steam or other mechanical power.”

13. *Cheap Trains.*

passenger station. And it was further provided (s. 9) that no passenger duty should be levied upon the receipts of the companies in respect of such trains, which became known as "Parliamentary trains" or "Government trains." By s. 8 the Board of Trade had a general power of dispensing with the conditions and substituting others, and by s. 9 the companies were exempted from passenger duty in respect of these trains. But these sections, having given rise to much controversy in connection with the exemption from duty (q), were repealed by the Cheap Trains Act, 1883, 46 & 47 Vict. c. 34, which by s. 3 empowers the Board of Trade, after inquiries, or under certain circumstances, the Railway and Canal Commission, to order (qq) any railway company to provide "a due and sufficient proportion of the accommodation provided by such company" for "passengers at fares not exceeding the rate of one penny a mile," or to order that "upon any railway carrying passengers proper and sufficient workmen's trains" be "provided for workmen going to and returning from their work, at such fares and at such times between six o'clock in the evening and eight o'clock in the morning as appear to the Board of Trade to be reasonable"—a company not complying with an order under the act to lose the benefit of it.

Obligations to run cheap trains under special acts.

The Great Northern Railway Act of 1850 (13 & 14 Vict. c. lxi) enacts (sect. 13), that the companies governed by that Act shall run third-class carriages "as often and under such conditions as the Railway Commissioners (r) shall from time to time prescribe." A Midland Railway Act of 1846 (9 & 10 Vict. c. cccxxvi) enacts (sect. 59) that the speed of the parliamentary train shall be not less than 20 miles an hour. A Metropolitan Railway Act of 1861 (24 & 25 Vict. c. cccxxiii) contains a provision (sect. 24) compelling the company to run cheap trains for the labouring classes. And in many of the Railway Acts passed in 1864 (s) and 1865 (t), and subsequently, there is contained a similar provision for the benefit

(q) See *North London R. Co. v. Attorney-General*, L. R., 1 App. Cas. 118, and sect. 11 of this chapter, post.

(qq) The Railway Commissioners made an order under this act upon the North London and London and North Western Railway Companies on the 17th February, 1888. The jurisdiction of the Railway Commissioners is transferred to the Railway and Canal Commission by s. 8 of the Railway and Canal Traffic Act, 1898.

(r) Now Board of Trade, see 11 & 15 Vict. c. 84, vol. II.

(s) The London, Chatham and Dover (New Lines) Act, 1861 (27 & 28 Vict. c. cxv, s. 134); The Metropolitan Railway (Notting Hill and Brompton Extension) Act, 1861 (27 & 28 Vict. c. cxci, s. 45); The Great Eastern Railway (Me-

tropolitan Station and Railways) Act, 1861 (27 & 28 Vict. c. ccxxiii, s. 80); The Metropolitan Railway (Tower Hill Extension) Act, 1861 (27 & 28 Vict. c. ccxxv, s. 25); The North Western and Charing Cross Railway Act, 1864 (27 & 28 Vict. c. ccxxiii, s. 95).

(t) E.g., The Metropolitan and St. John's Wood Railway (Extension to Hampstead) Act, 1865 (28 & 29 Vict. c. xxxi, s. 51); The East London Railway Act, 1865 (28 & 29 Vict. c. li, s. 144); The London, Blackwall and Millwall Extension Railway Act, 1865 (28 & 29 Vict. c. cxvi, s. 58). See also The Dublin, Wicklow and Wexford Railway Act, 1865 (28 & 29 Vict. c. ccxxii, s. 37); The Dublin Metropolitan Junction Railways Act, 1865 (28 & 29 Vict. c. ccclxxii, s. 54).

of artisans, mechanics and daily labourers (both male and female) having daily business in London, who must (in some cases), if required, give their name and address and that of their employer. The liability of the company in respect of injuries is limited; and the Board of Trade have certain controlling powers over the trains.

The Metropolitan Inner Circle Completion Act, 1874, enacts:—

“Sect. 73. The company shall and they are hereby required, at all times after the opening of the railway for public traffic, to run every day in the week (Sunday, Christmas Day, and Good Friday always excepted), at such hours, not being later than 7 a.m., or earlier than 6 p.m., as may be most convenient for the labouring classes resident at or beyond or in the neighbourhood of the railway and resorting to or returning from their work in the neighbourhood of the railway, and resorting to or returning from their work in the neighbourhood of or beyond the railway, and at fares not exceeding twopence per passenger for each journey, a train in the morning and a train in the evening, each of which trains shall call at all stations on the railway: Provided that in case of any complaint made to the Board of Trade of the hours appointed by the company for such trains, the said Board shall have power to fix and regulate the same from time to time; and also that if in any continuous period of six months it shall be found that less than one hundred of such passengers shall have been conveyed by each of such trains, the company, on proof of that fact to the satisfaction of the Board of Trade, may discontinue the running of such trains, but the said Board may at any time order the resumption thereof by the company if it shall seem to the said Board desirable so to do.

“Sect. 74. The liability of the company under any claim to compensation for injury or otherwise in respect of each passenger travelling by any such train at the fare aforesaid, is by this act limited to a sum not exceeding one hundred pounds, and the amount of compensation payable in respect of any passenger so injured shall be determined by an arbitrator to be appointed by the Board of Trade and not otherwise.”

The expediency of special legislation on the subject of third-class traffic was much questioned by the Joint Select Committee on Railway Amalgamation in the following terms:—

*Expediency of special legislation as to third-class traffic questioned.*

“The history of the traffic in third-class passengers affords a strong argument against attempting to foresee and provide for a want of this description by imposing general, compulsory, and permanent obligations on railway companies. It has been shown that Parliament, anxious to protect the lower classes at any rate from the apprehended monopoly of railway companies, imposed special obligations on the companies, supposed to be in favour of these classes, and attached to these obligations a special exemption from railway taxation. It has also been shown that railway companies in their own interest are now doing for third-class passengers more than Parliament ever thought of requiring; that third-class traffic is one of the most growing sources of profit, and that the present operation of the special legislation on the subject is to give a very questionable exemption from general railway taxation, to create confusion and litigation, and to give the companies inducements for withholding from third-class passengers facilities which they would otherwise afford. The ill-success of this attempt may well justify hesitation in entering upon further general legislation of the same kind; but the Committee are of opinion that if it should be thought desirable in any case to impose upon companies seeking for amalgamation the obligation of running workmen's trains, it may fairly be done in consideration of the benefits to be conferred on them by Parliament, without any special privilege or exemption being granted to them in return.”



14. *Passenger Duty*

5 &amp; 6 Vict. c. 79.

14. *The Railway Passenger Duty.*

The duties payable in respect of railway passengers are levied under 5 & 6 Vict. c. 79, which, after repealing 2 & 3 Will. 4, c. 120 (which levied a duty of  $\frac{1}{2}d.$  per mile for every four passengers carried), enacts (sect. 2, and schedule), that there shall be paid in Great Britain for passengers conveyed upon any railway:—

“For and in respect of all passengers conveyed for hire upon or along any railway, a duty at and after the rate of 5*l.* for every 100*l.*, upon all sums received or charged for the hire, fare, or conveyance of all such passengers.”

Exemption from duty on cheap trains.

This tax was not payable in respect of passengers conveyed in the third-class trains, travelling under the conditions imposed by 7 & 8 Vict. c. 85, commonly called parliamentary trains, and is subject to modifications by the Cheap Trains Act, 1883.

The construction of the early enactments relating to passenger duty has come before the House of Lords in two cases.

*G. W. R. Co. v. Attorney-General.*

In *Great Western R. Co. v. The Attorney-General* (u), it was held that the company actually receiving the fares was bound to keep the accounts and pay the duties without reference to the question for whose ultimate benefit the fares were received; and, further, that duty was payable in respect of all trains not stopping at every station, although by virtue of a special Act the company running the trains had not power to stop at certain stations. “It may be observed,” it is said in the judgment of the Court of Exchequer (x), “that this is a case where the defendants claim the benefit of an exemption from duty granted in very clear terms, and they must bring themselves precisely within the terms which create the exemption; for as there is no equitable liability to a tax by coming as near as possible to the circumstances which make it payable, so also there is no equitable exemption by doing the best that can be done to come within the terms of the exemption.”

Burden on company to bring themselves within terms of exemption.

Exemption from duty can only be claimed in respect of stopping trains. *North London R. Co. v. Attorney-General.*

In the more important case of *North London R. Co. v. The Attorney-General* (y), it was held by the House of Lords, chiefly upon the construction of the Cheap Trains Act, 1844, 7 & 8 Vict. c. 85, that trains were liable to duty notwithstanding that they had no third-class carriages attached to them, and whether the tickets

(u) L. R., 1 H. L. 1; 35 L. J., Ex. 123, affirming decision below (Martin, B. J., diss.), 31 L. J., Ex. 215, 5 H. & N. 810. The Great Western had made a loop line over which the Midland had by act of Parliament running powers, and exercised such powers independently of the Great Western. The fares received at the stations on the loop line for passengers carried by the

Midland were received by the clerks of the Great Western for the benefit of the Midland.

(x) 5 H. & N., at p. 868.

(y) L. R., 1 App. Cas. 148; 31 L. T. 297, affirming (but for different reasons) *Attorney-General v. North London R. Co.*, L. R., 9 Ex. 310; 13 L. J., Ex. 233; 31 L. T. 377.

issued were first, second, or third-class tickets, or whether the passengers actually travelled in first, second, or third-class carriages; that the exemption from duty was not lost by the passengers being required, without unreasonable detention, to change from one train to another; that no train was exempt from duty, whether approved of by the Board of Trade or not, which did not stop at every intermediate ordinary passenger station; that return fares were not exempt from duty unless the corresponding single fares would not exceed the statutory rate; and that the Board of Trade had no power to dispense with the condition requiring the trains to stop at intermediate ordinary passenger stations (z).

This decision led to the appointment of a Select Committee of the House of Commons, which presented a Report in the Session of 1876 (a). This Report, after calling attention to the fact that the Inland Revenue and the Board of Trade, from the impossibility of strictly following the Cheap Trains Act, had been forced, by certain arrangements with the companies, to countenance a departure from the law as decided by the House of Lords—a state of affairs which the Committee naturally regarded as “in the highest degree unsatisfactory”—recommended the repeal of the duty “as undesirable to maintain longer than is necessary from a fiscal point of view.” Pending the arrival of a period when the finances of the State should warrant the abolition of the tax, the Committee recommended certain modifications, which were in great measure, but after a considerable time, carried into effect by the Cheap Trains Act, 1883, 46 & 47 Vict. c. 34, ss. 2, 3, as follows:—

Report of Committee of 1876.

Fares at not more than 1*d.* a mile (b) are exempt from duty, but fares for return or periodical tickets are exempt only where the ordinary fare for the single journey does not exceed that rate:

Modifications of duty by Cheap Trains Act, 1883.

Fares at more than 1*d.* a mile in “urban districts,” certified so to be by the Board of Trade, i.e., fares between stations within an area having a continuous urban character, and containing a population of not less than 100,000 inhabitants, are chargeable with a 2 per cent. instead of the 5 per cent. duty: *but*

The 5 per cent. duty becomes again chargeable (c) upon a company disobeying an order of the Board of Trade or the Railway and Canal Commission to provide either sufficient accommodation at fares not more than 1*d.* a mile or sufficient “workmen’s trains.”

Every company must keep a book open for the inspection of any authorized officer of the Inland Revenue, containing an account of

Obligation to keep accounts.

(z) See the facts, with extracts from the judgments, and the decree of the Court of Exchequer, in the 6th edition of this work, p. 536.

(a) See the report at length in the 6th

edition of this work, App. p. 1004.

(b) As to fractions of miles, see *n.* 5.

(c) The exemption for trains stopping at every station would probably revive.

14. *Passenger's Duty.*  
5 & 6 Vict. c. 74.

Certificate of  
verification.

Bond to secure  
duties.

Exclusion of  
duty from  
maximum.  
\* Page 460.

Duty on extra  
charge for  
sleeping  
carriages.

the money received or charged daily for the fare of the passengers conveyed along the railway, and also an account of money paid or accounted for to other railway companies; and, within 20 days after the end of every month, a copy of such accounts during the whole of the month last preceding must be delivered to the Inland Revenue (*d*), with a certificate (*e*) verifying such account; and at the time of delivering this account, the stamp duties chargeable in respect of the passengers conveyed, according to such account (exclusive of money payable by other companies), must be paid (*f*). Every company must also give a bond, with sufficient sureties, unless this security be dispensed with (*g*), for the due performance of all matters required to be done by the above Act; and, on default of such bond (if not dispensed with) being given or renewed, 100*l.* for every day of such default is forfeited (*h*).

Various special Acts prescribe the maximum fares, "except government duty" (*i*); but if the duty be charged to a passenger separately from the fare, the company do not thereby escape payment on the amount charged in respect of the duty, but must pay duty on the whole amount paid by the passenger (*k*).

A company must also pay duty on any extra sum paid in respect of "sleeping carriages" (*l*).

#### 15. *Telegraphs.*

#### 15. *Obligation to permit Telegraphs to be constructed.*

7 & 8 Vict. c. 85,  
s. 13.

Every railway company is required to allow the Board of Trade to establish and lay down upon their lands a line of electrical telegraph for her Majesty's service, and to give every reasonable facility for laying down and using the same on her Majesty's service, subject to such reasonable remuneration to be paid to the company as may be agreed upon, or, in case of disagreement, as may be settled by arbitration. And it is provided, that, subject to a prior right of use for the purposes of her Majesty, the telegraph may be used by the

(*d*) 26 & 27 Vict. c. 33, s. 13.

(*e*) Cheap Trains Act, 1883, s. 7 (*a*).

(*f*) 5 & 6 Vict. c. 74, ss. 4, 5.

(*g*) Cheap Trains Act, 1883, s. 7 (*b*).

(*h*) *Ibid.* s. 7.

(*i*) "The Great Western, London and North Western, London Brighton and South Coast (see p. 460), the Great Northern, and the North Eastern Companies have statutory power to charge the duty in addition to the maximum."—Report of Select Committee, p. 23. "Some of these companies have added five per cent. to their

third class fares, except in the case of parliamentary trains strictly so called."—Inland Revenue Report, 1875. The Lancashire and Yorkshire, by 22 & 23 Vict. c. ex. s. 61, and the Midland, by 9 & 10 Vict. c. cccxvi, s. 59 (p. 460, ante), also appear to have the duty excepted from the maximum.

(*k*) *Attorney-General v. L. & N. W. R. Co.*, L. R., 8 Q. B. D. 216; 50 L. J., Q. B. 170—C. A.

(*l*) *Ibid.*

company, for the purposes of the railway, upon terms to be agreed upon, or, in case of disagreement, as may be settled by arbitration. If a line of telegraph has been established by the company or by any other persons, otherwise than exclusively for her Majesty's service, or exclusively for the purposes of the railway, or jointly for both, the use of such telegraph for the purpose of receiving and sending messages must, subject to the prior right of use thereof for the service of her Majesty and for the purposes of the company, and subject also to such equal charges, and to such reasonable regulations as may be made by the company, be open for the sending and receiving of messages by all persons alike, without favour or preference.

Injuring telegraphic wires or posts, or obstructing the conveyance of a telegraphic message, is a misdemeanor punishable by imprisonment for not more than two years, if the offender be sent for trial; but the charge may be heard summarily, and in that case the convicting justice may either sentence the offender to not more than three months' imprisonment, or to pay a fine not exceeding ten pounds. The attempt to commit any of the above offences is punishable on summary conviction (*m*).

Injures to telegraphs.

Several private companies have been incorporated for the purpose of carrying on telegraphic communications (*n*), and lines of railway were in many cases used by them usually under contracts made with the railway companies. But in 1868 it was deemed expedient that "a cheaper, more widely extended and more expeditious system of telegraphy should be established," and that the telegraphs should be worked in connexion with the General Post Office.

Accordingly, the Telegraph Act, 1868 (*o*), enabled her Majesty's Postmaster-General to acquire, work and maintain electric telegraphs, and contains various provisions of the highest importance relating to telegraphs belonging to railway companies, or placed along railways.

Working telegraphs by her Majesty's Postmaster-General. Telegraph Act, 1868.

By this Act it was provided that it should be lawful for the Postmaster-General, with the consent of the Treasury, out of monies which might be appropriated by Act of Parliament to purchase the whole or such parts as he should think fit of the undertaking of any telegraph company: (Sect. 4). Any railway company possessed of a public telegraph on January 1st, 1868, became entitled to require the Postmaster-General to purchase their interest in such telegraph in the event (which happened) of the Postmaster-General acquiring

(*m*) 24 & 25 Vict. c. 97, ss. 37, 38, post, vol. II.

(*n*) 7 & 8 Vict. c. 85, s. 11, post, vol. II.

(*o*) 31 & 32 Vict. c. 110, post, vol. II. As to telegraphs, so far as they do not

come within the provisions of this act, see the United Kingdom Telegraph Act, 1862 (25 & 26 Vict. c. cxxi, ss. 42, 43, 47), Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 6.

15. Telegraphs.

Compensation to companies.

Compensation to telegraph officers.

any one undertaking under the powers of the Act (*p*): (Sect. 7). With certain railway companies agreements for purchase had already been made, and these agreements were confirmed: (Sects. 9, 13, and schedule). As to certain other railway companies, it was provided that upon the acquisition by the Postmaster-General of the undertakings of the telegraph companies with which such companies had agreements, the whole telegraphic apparatus "should become the absolute property of the railway companies," so that they might be "in a position at once to carry on their own telegraph work on their own system;" but that the Postmaster-General should be entitled to use all the wires employed exclusively in the transmission of public telegraph business: (Sect. 9, sub-sects. 2, 3, 6, 7). The compensation to the companies is fixed at twenty years' purchase, with additional compensation for reversionary and other interests, "to be settled by arbitration in default of agreement:" (Sect. 9, sub-sect. 6). The companies have power to make arrangements with coalmasters and other traders for the working of private telegraphs on payment of an annual rent: (Sect. 9, sub-sect. 8).

The telegraph superintendent of a railway company is not entitled under sect. 8, sub-sect. 7, to compensation for loss of office, as that section applies only to the three telegraph companies named therein (*q*). A fixed allowance for travelling expenses is part of an "annual emolument" within the meaning of that enactment (*r*).

16. Regulations as to Bye-Laws.

Bye-laws affecting the public.

\* Page 418, ante.

R. C. Act, s. 108.

16. Regulations as to Bye-Laws.

The jurisdiction of the Board of Trade in respect of bye-laws has been already considered.\*

By the Railways Clauses Consolidation Act, 1845, it is enacted, that a railway company may from time to time make regulations for the following purposes:—

For regulating the mode by which, and the speed at which, carriages using the railway are to be moved or propelled;

For regulating the times of the arrival and departure of any such carriages;

For regulating the loading and unloading of such carriages, and the weights which they are respectively to carry;

For regulating the receipt and delivery of goods, and other things which are to be conveyed upon such carriages;

(*p*) As to what is a beneficial interest within the meaning of this section, see *Rog v. Lord's Chamberlain*, 34 L. T. 752.

(*q*) *Iry. v. Postmaster-General*, 32 L. T. 559.

(*r*) *Ibid.* W. N. 1876, p. 172 (Q. B. D.).

For preventing the smoking of tobacco, and the commission of any other nuisance, in carriages, or stations ;

And, generally, for regulating the travelling upon, or using and working of the railway (8 Vict. c. 20, s. 108).

And, for better enforcing the observance of such regulations, the company may, subject to the approval of the Board of Trade (*s*), make bye-laws, and, from time to time, repeal or alter them, provided such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of that or the special Act (*t*); such bye laws must be reduced into writing, and have the common seal of the company affixed.

It has been doubted by Cockburn, C. J., whether the above section empowers companies to make bye-laws applicable to persons travelling in the companies' own carriages (*u*), and Lord Coleridge, C. J., has expressed himself as prepared to hold, if necessary, that the section must be limited to the ordering of the traffic itself, and the physical use and working of the lines, so as not to authorize a bye-law as to travelling without a ticket (*v*). But Lindley, J., has expressed a contrary opinion (*y*) which is, it is submitted, the more correct one on the ground that the words "travelling upon," which grammatically include travelling in the companies' own carriages, cannot with reason be restricted to foreign carriages.

Extent of power to make bye-laws under s. 108 of Act of 1845.

The following code of bye-laws is now universally adopted :—

No. 1. No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of the carriage and the stations for conveyance between which such ticket is issued. *Every passenger shall show and deliver up his ticket (whether a contract or season ticket or otherwise) to any duly authorized servant of the company whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey (z).*

Obtaining ticket and delivering up the same.

No. 2. Any passenger using or attempting to use a ticket on any day for which such ticket is not available, or using a ticket which has been already used on a previous journey, is hereby subjected to a penalty not exceeding forty shillings.

Using ticket for any other day.

No. 3. Any passenger using or attempting to use a ticket for any other station than that for which it is available will be required to pay the difference between the sum actually paid and the fare between the stations from and to which the passenger has travelled, or, at the option of the company, the fare from the station to which he was booked to the end of his journey.

Using ticket for any other station.

(v) Under 3 & 4 Vict. c. 97, ss. 7, 8, 9.

(t) See *Durden v. Townsend*, L. R., 1 Q. B. 10, post, p. 512.

(u) *Stammers v. South Eastern R. Co.*, L. R., 5 Q. B. D. 156, and p. 514, post.

(v) *London & Brighton Co. v. Watson*, L. R., 3 C. P. D., at p. 437, and p. 514,

post.

(y) In *Dixon v. L. & N. W. R. Co.*, L. R., 7 Q. B. D., at p. 35.

(z) This part of this bye-law is void for unreasonableness. *Stammers v. South Eastern R. Co.*, L. R., 5 Q. B. D. 156, and p. 514, post.

16. *Regulations  
as to Bye-Laws.*  
Defacing tickets.

Sale and  
purchase of  
return tickets.

Tickets issued  
when there is  
room

Smoking.

\* Page 448, note.

Using ticket for  
superior class.

Being intoxi-  
cated or using  
obscene or  
abusive  
language &c.

amazing pro-  
perty.

No. 4. Any passenger wilfully altering or defacing his ticket so as to render the date, number or any material portion thereof illegible, is hereby subjected to a penalty not exceeding forty shillings.

No. 5. A return ticket is granted solely for the purpose of enabling the person for whom the same is issued to travel therewith to and from the stations marked thereon, and is not transferable. Any person who sells, or attempts to sell, or parts or attempts to part with the possession of the return half of any return ticket, in order to enable any other person to travel therewith, is hereby subjected to a penalty not exceeding forty shillings, and any person purchasing such half of a return ticket, or travelling or attempting to travel therewith, shall be liable to pay the fare which he would have been liable to pay for the single journey, and shall in addition thereto be subjected to a penalty not exceeding forty shillings.

No. 6. At the intermediate stations the fares will only be accepted, and the tickets issued conditionally; that is to say, in case there shall be room in the train for which the tickets are issued. In case there shall not be room for all the passengers to whom tickets have been issued, those to whom tickets have been issued for the longest distance shall (if reasonably practicable) have the preference, and those to whom tickets have been issued for the same distance shall (if reasonably practicable) have priority according to the order in which tickets have been issued, as denoted by the consecutive numbers stamped upon them. The company will not, however, hold itself responsible for such order of preference or priority being adhered to, but the fare or difference of fare, if the passenger travel by an ordinary train in a class of carriage inferior to that for which he has a ticket, shall be immediately returned, on application, to any passenger for whom there is not room as aforesaid, if the application be made before the departure of the train.

No. 7. Every person smoking in any shed or covered platform of a station, or in any building of the company, or in any carriage or compartment of a carriage not specially provided for that purpose,\* is hereby subjected to a penalty not exceeding forty shillings. The company's officers and servants are required to take the necessary steps to enforce obedience to this bye-law; and any person offending against it is liable, in addition to incurring the penalty above mentioned, to be summarily removed, at the first opportunity, from the carriage, or from the company's premises.

No. 8. Any person travelling, without the special permission of some duly authorized servant of the company, in a carriage or by a train of a superior class to that for which his ticket was issued, is hereby subjected to a penalty not exceeding forty shillings; and shall in addition be liable to pay the fare, according to the class of carriage in which he is travelling, from the station whence the train originally started, unless he shows that he had no intent to defraud (a).

No. 9. Any person found in a carriage, or elsewhere upon the company's premises, in a state of intoxication, or using obscene or abusive language, or writing obscene or offensive words on any part of the company's stations or carriages, or committing any nuisance, or otherwise wilfully interfering with the comfort of other passengers, is hereby subjected to a penalty not exceeding forty shillings and shall immediately, or, if a passenger, at the first opportunity, be removed from the company's premises.

No. 10. Any person who wilfully cuts or tears any lining or window strap or curtain, removes or defaces any number plate, or breaks or scratches any

(a) This bye-law is illegal and void. *Dyson v. L. & N. W. R. Co.*, L. R., 7 Q. B. D. 32, and p. 513, post.

window of a carriage used on the railway, or who otherwise, except by unavoidable accident, damages, defaces or injures any such carriage, or any station, or other property of the company, is hereby subjected to a penalty not exceeding five pounds, in addition to the amount of any damage for which he may be liable.

No. 11. No passenger shall be permitted to travel on the roof, steps or foot-board of any carriage, or on the engine, or in the guard's van, or any portion of any carriage not intended for the conveyance of passengers; and any passenger persisting in doing so, after being warned to desist by the guard in charge of the train, or any duly authorized servant of the company, is hereby subjected to a penalty not exceeding forty shillings, and shall be liable to be summarily removed from the company's premises.

Travelling on roof, steps, &c.

No. 12. Any passenger entering or leaving, or attempting to enter or leave, any carriage while the train is in motion, or elsewhere than at the side of the carriage adjoining the platform, or other place appointed by the company for passengers to enter or leave the carriages, is hereby subjected to a penalty not exceeding forty shillings.

Entering or leaving carriage when in motion.

No. 13. Any passenger persisting in entering a carriage or compartment of a carriage containing the full number of persons which it is constructed to convey, when any such person objects to his so entering the carriage or compartment, is hereby subjected to a penalty not exceeding forty shillings.

Entering full carriage.

No. 14. Dogs and other animals will not be suffered to accompany passengers in the carriages, but will be conveyed separately and charged for, and any person taking a dog or other animal with him into any passenger carriage used on the railway is hereby subjected to a penalty not exceeding forty shillings.

Conveyance of dogs in carriages.

No. 15. Loaded firearms are on no account to be taken into or placed upon any carriage, waggon, truck or other vehicle forming or intended to form a train or any portion of a train on the railway, or to be brought to the station or on to the premises of the company, and every person so offending is hereby subjected to a penalty not exceeding five pounds.

Taking loaded firearms.

No. 16. The company may refuse to carry any person who has any infectious disorder. If any person who has any such disorder is found upon the premises of the company, or travels or attempts to travel on the railway of the company, without the special permission of the company, he shall be liable to a penalty not exceeding forty shillings in addition to the forfeiture of any fare which he may have paid, and may be removed at the first opportunity from the company's premises. Any person who has charge of any person suffering from an infectious disorder while upon the premises of the company, or travelling or attempting to travel on the railway, or who aids or assists any person suffering from such disorder in being upon the premises of the company, or travelling or attempting to travel on the railway, shall be liable to a penalty not exceeding forty shillings, unless the person suffering from such disorder be travelling with the special permission of the company.

Travelling with infectious disorder.

No. 17. Every driver or conductor of an omnibus, cab, carriage or other vehicle shall, while in or upon any station yard or other premises of the company, obey the reasonable directions of the company's officers and servants duly authorized in that behalf; and every person offending against this regulation is hereby subjected to a penalty not exceeding forty shillings.

Omnibuses, &c., drivers, obeying servants of company.

Given under the common seal of the  
day of . 18.

Railway Company, the  
(Seal of the company.)  
Secretary of the company.



16. *Regulations  
as to Bye-Laws.*

The Board of Trade hereby signify their allowance and approval of the above bye-laws and regulations.

Signed by order of the Board of Trade the       day of       18       .

Assistant-Secretary to the Board of Trade.

Notices.

Below the bye-laws it is usual for the companies to publish, in conformity with sect. 143 of the Railways Clauses Act, 1845, particulars of the several offences for which any penalty is imposed, by that or the special Act.

Application of  
bye-laws.  
Penalty for in-  
fringing bye-law.

It has been doubted by Cockburn, C. J., whether any person offending against a bye-law is liable to a penalty (*b*) not exceeding 5*l.*, to be imposed in the bye-law, and recoverable summarily before two justices (*c*); and if the infraction of the bye-law is attended with danger and annoyance to the public, or hindrance to the company, they may interfere summarily to obviate the danger, &c. (*d*). The breach of a bye-law does not otherwise justify the apprehension of the offender. The 154th section of the Railways Clauses Act allows apprehension only for a disregard of the provisions of that or the special Act. The 104th section, however, gives an express power of apprehension for travelling without having paid the fare, and with intent to avoid payment thereof. The substance of the bye-laws must be printed, and kept affixed on the front, or other conspicuous part of every wharf or station belonging to the company, otherwise a penalty may not be enforced (*e*). Bye-laws affecting a wharf must be published at the wharf, and bye-laws affecting a station must be published at the station; but it is not necessary in order to obtain a conviction to prove publication at every station. It is enough if the bye-laws were published at the two stations where the offender entered the train and alighted from it (*f*). The company are justified in acting upon such bye-laws, and provision is made for proving their publication (*g*).

Publication of  
bye-laws.

The Railways Clauses Act contains no provision analogous to sect. 127 of the Companies Clauses Act, as to proof of the bye-laws themselves, in case of prosecutions for offences against them. It has, however, been decided by the Court of Common Pleas (*h*), that bye-laws made pursuant to the Railways Clauses Act are documents of a public nature and proveable as such, i.e., by an examined and certified copy.

Bye-laws affect-  
ing servants  
of the company.

The company may also, under the Companies Clauses Act, make bye-laws for regulating the conduct of their servants, and for pro-

(*b*) 8 & 9 Vict. c. 20, s. 109.

(*c*) *Ibid.* s. 115.

(*d*) *Ibid.* s. 109.

(*e*) *Ibid.* s. 110.

(*f*) *Mottram v. Eastern Counties R.*

*Co.*, 29 L. J., M. C. 57; *dis. Williams, J.*

(*g*) 8 & 9 Vict. c. 20, s. 111. And see 8 & 9 Vict. c. 113, s. 1.

(*h*) *Mottram v. Eastern Counties R. Co.*, *ubi supra*.

viding for the due management of the affairs of the company, and alter and repeal the same; such bye-laws must be authenticated by the seal of the company, and a copy given to every officer and servant affected thereby (i). A penalty, not exceeding 5*l*. for each offence, may, by such bye-laws, be imposed upon servants of the company (k). But a justice may order a part only of the penalty to be paid (l).

Copy must be given to servant

As a general principle, all bye-laws in restraint of trade must be reasonable and beneficial to the public, or they cannot be supported (m). The sanction of the Board does not of course preclude an inquiry into the validity of bye-laws (n).

Bye-laws must be reasonable.

It was argued in an early case that a bye-law (similar to bye-law No. 1 of the model code) by which a passenger failing to produce his ticket was required to pay the fare from the place where the train originally started, was not a reasonable bye-law, but the Court appeared to be of opinion that it was (o), though holding it not to be enforceable by arrest (o). And in a later case in Ireland, where the bye-law imposed a penalty of forty shillings in default of payment of the fare, only Pigot, C. B., appeared to have any doubt as to the validity of the bye-law (p). But in *Dearden v. Townsend*, the Court of Queen's Bench was clear that a bye-law requiring payment of the fare from the place whence the train started, or a forfeiture of not more than forty shillings, could only operate in the case of a passenger intending to defraud the company, and that upon any other construction the bye-law would be invalid (q). Since *Dearden v. Townsend*, the bye-law, omitting as in the model code the words imposing a forfeiture, has been under the consideration of the Courts very frequently; and it may now be taken as established beyond doubt by authority that bye-law No. 1 in the model code is unreasonable and void (r), and even although the passenger may have an intent to defraud (s), the result of the decisions seeming to be, though there has been no express decision to that effect upon bye-law No. 1, that the passenger cannot be convicted under the bye-law.

Requirement of fine on failure to produce ticket.

*Dearden v. Townsend*.

(i) 8 & 9 Vict. c. 16, s. 124.

(k) *Ibid.* s. 125.

(l) *Ibid.* s. 126.

(m) *Ginnmakers' Co. v. Ell, Willes*, 389; *Bosworth v. Hurst*, Cas. temp. Hardw. 405.

(n) See *R. v. Wood*, 1 E. & B. 49. As to how far bye-laws are divisible, see *R. v. Laidie*, 31 L. J., M. C. 157. Bye-laws exempting railway companies from responsibility for passengers' luggage were void in *G. W. R. Co. v. Goodman*, 12 C. B. 313, and *Williams v. G. W. R. Co.*, 10 Exch. 15.

(o) *Chillon v. London and Croydon R. Co.*, 16 M. & W. 212; 5 Railw. Cas. 4.

(p) *Barry v. Midland Great Western R. Co.*, 17 Ir. C. L. 103.

(q) *Dearden v. Townsend*, L. R., 1 Q. B. 10; 38 L. J., M. C. 50; 12 Jur., N. S. 120.

(r) *Stranders v. South Eastern R. Co.*, L. R., 5 Q. B. D. 460; 13 L. T. 281; 29 W. R. 50. For previous dicta to the contrary, see per Lush, J., in *Brown v. Great Eastern R. Co.*, L. R., 2 Q. B. D. 406, decided against the company because they had not made a demand.

(s) See *Dyson v. L. & N. W. R. Co.*, L. R., 7 Q. B. D. 32; 50 L. J., M. C. 78; 44 L. T. 609; 29 W. R. 565, decided on bye-law No. 8.

16. *Regulations  
as to Bye-Laws.*

Non-payment of  
fare—continued.

Nor can the fare from the station whence the train started be recovered by civil action (*f*), although the fare from the station of the passenger's departure can (*u*), and if the passenger should have agreed to it beforehand when credit was given, any amount of fare, however high, can be recovered (*x*).

Bye-law No. 8 is unreasonable and void (*y*), although the passenger may have an intent to defraud (*z*).

The true view of the law is, it is submitted, that thrown out but not positively enunciated by Cockburn, C. J., in *Saunders v. South Eastern R. Co.* (*a*), that any bye-law in *pari materia* with sect. 103 of the Act of 1845 (p. 519, post) must be subsidiary to that section and not a variation of it, and it seems to follow that upon bye-laws No. 1 or No. 8 as at present framed, no conviction can be maintained.

Procedure on  
bye-law.

With regard to procedure, if a company proceed upon the bye-law, they cannot rely upon the statute (*b*), but if the complaint upon the bye-law should be dismissed, they may prefer a fresh complaint upon the statute (*c*).

Looking to the strong and frequent disapproval of the bye-laws expressed by the High Court (*d*), it is perhaps to be regretted that the question of their validity cannot be authoritatively decided by the Court of Appeal (on the ground that this question can only be raised in a criminal cause, and in a criminal cause no such appeal lies), the more especially as Bramwell and Cotton, L.JJ. (*e*), in deciding that no civil action lay on the bye-laws, "desired it to be understood that they expressed no opinion either one way or other" on the question of repugnancy to the statute.

Higher fare  
for short  
distance.  
*R. v. Fries.*

In *R. v. Freere*, a bye-law subjected to a penalty any passenger who should enter a carriage without having paid his fare; and the fare from Colchester to Norwich was 5s., and 7s. from Colchester to Diss (an intermediate station between Colchester and Norwich), and a person took a ticket from Colchester to Norwich, but got out at Diss, and refused to pay the 2s. difference; it was held that he could not be convicted under the bye-law (*f*). This decision proceeded on the ground that the defendant had paid his fare within the meaning of the particular bye-law, Lord Campbell, C. J., "cautiously abstaining

(*b*) *London and Brighton R. Co. v. Watson*, L. R., 1 C. P. D. 118; 48 L. J., C. P. 316; 40 L. T. 183; 27 W. R. 614; aff. L. R., 3 C. P. D. 219.

(*u*) *Ib.*

(*x*) *Ib.*, per Bramwell, L.J.

(*y*) *Bentham v. Hoyle*, L. R., 3 Q. B. D. 289; 47 L. J., M. P. 51; 31 L. T. 753; 26 W. R. 311.

(*z*) *Dyson v. L. & N. W. R. Co.*, L. R., 7 Q. B. D. 32, and *supra*.

(*a*) L. R., 5 Q. B. D., at 461, and

*supra*.

(*b*) See 11 & 12 Vict. c. 43, s. 10.

(*c*) See per Lindley, J., in *Dyson v. L. & N. W. R. Co.*, L. R., 7 Q. B. D., at p. 37.

(*d*) See especially per Lord Coleridge, C.J., in *London and Brighton R. Co. v. Watson*, L. R., 3 C. P. D. 219.

(*e*) In *London and Brighton R. Co. v. Watson*, L. R., 4 C. P. D., at p. 119.

(*f*) *R. v. Freere*, 4 E. & B. 598.

from pronouncing an opinion on the power of the company to make rules requiring a larger fare for a less distance." There is no doubt that the companies have power to require such a fare (g). A conviction upon a bye-law properly framed, in aid of such a requirement, of a person fraudulently infringing it would, it is submitted, be good. The passenger at any rate could be sued for the higher fare.

In *Pocock's case*, a passenger took at Westbourne Park a return ticket to West Drayton for half-a-crown, and travelled by it, and also further on to Paddington on the return journey without a new ticket or further payment. At Paddington he claimed to be exempted from the further payment of threepence, the single fare from Westbourne Park to Paddington, on the ground that as the charge for a return ticket from Paddington to West Drayton was only half-a-crown, the half-crown which he had already paid covered the journey from Westbourne Park to Paddington. But Huddleston, B., and Hawkins, J., held the claim for exemption to be unsustainable (h), and the passenger to be liable to an action for the threepence. Here it will be seen that the company having carried the passenger the journey contracted for, the passenger claimed to be carried further, so that the case is distinguishable from *R. v. Frere*, which is the more common one of the journey contracted for being longer and cheaper than that which the passenger claims to make. But it is submitted that in such a case the passenger's claim could not be sustained: also that the fare recoverable would not be the reasonable fare for the shorter distance less the amount already paid, but the whole fare for the shorter distance without any such deduction; and this reasoning would apply to a claim to alight without further payment short of any journey contracted for, whether there should be a higher fare for a less distance or not.

The failure to produce a ticket, though coupled with a refusal to pay the fare from the station of departure, does not authorize a company to remove the traveller from a carriage by force. This was held by the Court of Appeal in *Butler v. Manchester, Sheffield and Lincolnshire R. Co.* (i), in which the court pronounced no opinion on the validity of the "bad" bye-law No. 1 under which the removal was made, but pointed out that it did not expressly authorize the removal.

It has been held in Scotland that bye-law No. 2 which makes it

Reaping benefit by travelling greater distance than contracted for.

Reaping benefit by travelling less distance than contracted for.

Alighting short of any journey contracted for.

Removal of passenger not paying his fare. *Butler's case*.

Using ticket on wrong day.

(g) See *Attorney-General v. Birmingham and Derby Junction R. Co.*, 2 Rail. Ca. 124.

(h) *Great Western R. Co. v. Pocock*, 41 L. T. 415; 28 W. R. 49.

(i) *Butler v. Manchester, Sheffield and Lincolnshire R. Co.*, L. R. 21 Q. B. D. 207; 57 L. J., Q. B. 564; 36 W. R. 726,

C. A., reversing Manisty, J., and apparently in conflict with *McCarthy v. Dublin, Wicklow and Wexford R. Co.*, 5 Ir. C. L. 244 Ex. Ch., not cited, in which the court went so far as to hold that a passenger offering to pay the fare might be removed, but in harmony with *Chilton v. London and Croydon R. Co.*, 18 M. & W. 212;

16. *Regulations as to Bye-Laws.*

## Publication of conviction.

Steam-vessels  
Explosives.

penal to use a ticket on the day other than that for which it is available, applies to a case of fraud only (*j*).

The companies frequently publish particulars of convictions for offences against bye-laws, and it seems that the publication of such particulars is not actionable as libel, if the particulars be true (*k*).

By the Railways Clauses Act, 1863 (*l*), the companies may make bye-laws for regulating their steam vessels, and by the Explosives Act, 1875 (38 Vict. c. 17 (sect. 33), post, vol. II.), railway companies over whose railway explosive substances are carried are bound to make regulations for the conveyance of it.

17. *Trespasses, Crimes, and Penalties.*

## Obstructing persons setting out railway.

Drunk  
servants, &c.  
5 & 6 Vict. c. 55.17. *Trespasses, Crimes, and Penalties.*

Any person wilfully obstructing any person setting out the line of railway, or pulling up stakes or marks showing the line, is liable to a penalty of 5*l*. : (Railways Clauses Act, 1845, s. 24.)

Any officer or agent of a railway company, or any special constable duly appointed, and all such persons as they may call to their assistance, may seize and detain any engine-driver, servant, or other person employed in conducting traffic, or in repairing works, who is found drunk while so employed, or who commits any offence against bye-laws, or wilfully, or negligently does or omits to do any act whereby danger is caused or trains obstructed: the offender may be conveyed forthwith before some justice of the peace for the place within which the offence was committed (*m*), without warrant; and, when convicted, is liable to two months' imprisonment or to pay a fine of 10*l*., or may be committed to quarter sessions, and, on conviction, be imprisoned for any term not exceeding two years: (5 & 6 Vict. c. 55, s. 17 (*n*).)

The provisions seem to apply to servants of the company only.

## Obstruction of train.

The Criminal Law Consolidation Acts of 1861 contain various provisions (*o*) relating to the obstructions of engines, &c., and having general application, whether the railway be open for traffic or not (*p*).

Thus, by 24 & 25 Vict. c. 97, s. 36, whoever, by any unlawful act, &c., obstructs any engine or carriage, is guilty of a *misdemeanor*.

Under this section, there need not be a physical obstruction. A person may be convicted as "obstructing" for unlawfully altering

Doing or omitting anything to obstruct engine or carriage.  
24 & 25 Vict. c. 97, s. 36.

also not cited. See the case criticised in the Solicitor's Journal for Nov. 17th, 1888. As to apprehension in case of *fraud*, see s. 104 of the Act of 1845, p. 519, post.

(*j*) *Thom v. Caledonian R. Co.*, 14 *Scott. Ca.*, 4th series, 5.

(*k*) *Alexander v. North Eastern R. Co.*, 34 *L. J.*, Q. B. 152; *Bliss v. Great Eastern R. Co.*, 16 *W. R.* 908; *Gwynne v. South Eastern R. Co.*, Q. B. Guildhall, July, 1868 (250*l*. damages recovered).

(*l*) 26 & 27 Vict. c. 92, s. 32.

(*m*) If the offence is committed in Scotland, see 5 & 6 Vict. c. 55, s. 18, vol. II.

(*n*) Parties charged with offences under 5 & 6 Vict. c. 55, s. 17, may also be tried at the sessions. See 5 & 6 Vict. c. 56, s. 2, post, vol. II.

(*o*) See these provisions at length in vol. II.

(*p*) See *R. v. Bradford*, 29 *L. J.*, M. C. 171.

signals, and thereby nearly stopping a train (q), or for imitating the action of inspectors of the line, and thereby diminishing its speed (r). By 24 & 25 Vict. c. 100, s. 34, whoever, by any unlawful act, or by a wilful omission or neglect, endangers the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, is guilty of a *misdeemeanor*, and, being convicted, is liable to similar punishment (s). Any unlawful act which a person does, the natural consequence of which is to endanger the safety of persons conveyed on the railway, is an offence within this section. Therefore, where two boys were playing with a cart belonging to a railway company and standing near the line, upon which the cart eventually ran down by its own impetus, and, after clearing a hedge and ditch, rested so close to the rails as to obstruct carriages passing thereon, it was ruled by Pigott, B., that if the jury thought the obstruction was the natural consequence of starting the cart, the prisoners ought to be found guilty, inasmuch as starting the cart was a trespass (t).

Endangering  
passengers.  
24 & 25 Vict.  
c. 100, s. 34.

By 24 & 25 Vict. c. 97, s. 35, whosoever "unlawfully and maliciously" (1) puts or throws on any railway any wood, stone, or other thing, or (2) displaces any rail, sleeper, &c., or (3) moves any points or other machinery, or (4) shows or removes any signal or light, or (5) does any other thing, *with intent* to obstruct or destroy any engine or carriage using the railway, is guilty of felony, and, being convicted, is liable to be kept in penal servitude for life, or for not less than [five (u)] years, or to be imprisoned for not more than two years, with or without hard labour, and, if a male under sixteen, with or without whipping.

Placing wood,  
&c. on railway  
with intent to  
obstruct or  
overthrow  
engine, &c.

Moreover, by 24 & 25 Vict. c. 100, s. 32, whosoever does any of the acts lastly mentioned, "with intent to endanger the safety of any person travelling or being upon such railway," is guilty of felony, and liable to similar punishment (x).

Placing wood,  
&c. upon a rail-  
way carriage  
with intent  
to endanger  
safety of  
passenger.

And, by sect. 33 of the same Act, whosoever unlawfully and maliciously throws, or causes to fall or strike, against any engine or carriage, any wood, stone, or other thing, *with intent* to injure or

Throwing stone,  
&c. upon a rail-  
way carriage  
with intent  
to injure  
passengers.

(q) *R. v. Haulfield*, L. R., 1 C. C. R. 253; 10 Cox, 571. The prisoner, who was drunk, changed the signals from "all clear" to "danger" and "caution."

(r) *R. v. Hardy*, L. R., 1 C. C. R. 278; 10 Cox, 658.

(s) Where a man pleaded guilty to an indictment under the above section (31), and the Court of Quarter Sessions stated a case for the Court of Criminal Appeal as to whether he ought not to have been indicted for felony under sect. 33, the case was rejected. *R. v. Clark*, 36 L. J., M. C. 16.

(t) *R. v. Monaghan*, 11 Cox, 608. As

to the meaning of "wilful" under the repealed enactment, 3 & 4 Vict. c. 97, s. 15, than which the present enactment is more extensive, see *R. v. Holroyd*, 2 M. & R. 339.

(u) 27 & 28 Vict. c. 47, s. 2.

(x) 24 & 25 Vict. c. 100, s. 32. This clause and 24 & 25 Vict. c. 97, s. 35, are taken from 14 & 15 Vict. c. 19, s. 6 (which was repealed by 24 & 25 Vict. c. 95), and "unlawfully" substituted for "wilfully." As to "hard labour" and "whipping," see sects. 74 and 75. This act does not extend to Scotland; see sect. 78.

17. *Trespassers,  
Crimes and  
Penalties*

endanger the safety of any person being in or upon such engine, &c., is guilty of *felony*, and, being convicted, liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than [five (y)] years, or to be imprisoned for any term not exceeding two years, with or without hard labour (z).

Summary trial  
of "young  
person."

By sub-sects. 11 and 49, and sched. 1. of the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, a "young person," *i.e.*, "a person who in the opinion of the Court before whom he is brought is of the age of twelve years and under the age of sixteen years," is, where charged before a Court of Summary Jurisdiction with any of the offences mentioned in 24 & 25 Vict. c. 97, s. 35, 24 & 25 Vict. c. 100, s. 32, or 24 & 25 Vict. c. 100, s. 33, above set forth, triable by that Court if the young person consent to be dealt with summarily, and if the Court think it expedient so to deal with him. On conviction, the punishment may be fine or imprisonment, with or without hard labour, for not more than three months.

Whipping of boy  
under s. 11 of  
Act of 1879.

"And if the young person is a male, and in the opinion of the Court under the age of fourteen years, the Court, if they think it expedient so to do, may, either in substitution for or in addition to any other punishment under this Act, adjudge such young person to be, as soon as practicable, privately whipped with not more than twelve strokes of a birch rod by a constable, in the presence of an inspector or other officer of police of higher rank than a constable; and also in the presence, if he desires to be present, of the parent or guardian of such young person."

Setting fire to  
railway station.

Whoever unlawfully and maliciously sets fire to any station, warehouse, or other building belonging or appertaining to any railway is guilty of *felony*, and, being convicted, liable to be kept in penal servitude for life, or for any term not less than [five (y)] years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and, if a male under sixteen, with whipping (a).

Injuries to  
bridges and  
viaducts.

And whoever unlawfully and maliciously in anywise destroys any bridge, viaduct or aqueduct, over or under which any railway passes, or does any injury with intent, and so as thereby to render such bridge, &c., or the railway passing over or under it dangerous or impassable, is guilty of *felony*, and, being convicted, liable to similar punishment (b).

(y) 27 & 28 Vict. c. 47, s. 2.

(z) 24 & 25 Vict. c. 100, s. 33. If the offender be tried at assizes, the judge has no jurisdiction to order a whipping. It is remarkable that this section, which provides for the punishment of an offence which boys are probably more likely to commit than anybody else, and for whom whipping would perhaps be the most suitable punish-

ment, does *not* authorize whipping, like the preceding section. And it is still more remarkable that the minor offences under 24 & 25 Vict. c. 100, s. 34, and 24 & 25 Vict. c. 97, s. 36, should have been omitted from sect. 13 of the Act of 1871.

(a) 24 & 25 Vict. c. 97, s. 4; sects. 11 and 12 apply to injuries by rioters.

(b) *Id.* s. 33.

It is also enacted, that if any person obstruct any officer of any railway company in the execution of his duty upon any railway premises; or if any person wilfully trespass (c) upon any railway premises and refuse to quit the same upon request to him made by any officer of the company, he may be seized and detained by any such officer or any person whom he may call to his assistance, until he can be conveniently taken before some justice of the peace for the county or place wherein such offence was committed, who may inflict a fine of 5*l.* on the offender, and, in default of payment, imprison him for two months, if the fine be not in the meantime paid. Proceedings cannot be quashed for want of form, or be removed by *certiorari* (d). In *Foulger v. Steadman* (e), a railway company admitted about forty cab-drivers to premises adjoining their station, upon a weekly payment, there being room for fifteen cabs at one time. It was held that a cabman who claimed the right to keep his cab on the premises without payment and refused to move it therefrom, was a "wilful trespasser" within the meaning of 3 & 4 Vict. c. 97, s. 17. The above applies to wilful trespass. With respect to trespassers of a more innocent character, it is enacted that if any person pass upon a railway (except at an authorized crossing), after having once received warning by the company not to pass thereon, forfeits 40*s.* for every such offence (f).

Obstructing officers.

Trespassing on railway.

Trespass by cabman.

Trespass after warning.

And the Companies Clauses Consolidation Act enacts, that any officer or agent of the company, and all persons called by him to his assistance, may seize and detain any person who shall have committed any offence against the provisions of that or the special Act, or any Act incorporated therewith, and whose home and residence shall be unknown to such officer or agent, and convey him, with all convenient despatch, before some justice; and such justice must proceed, with all convenient despatch, to the hearing and determining of the complaint against such offender (g).

Transient offenders.

By sect. 103 of the Railways Clauses Consolidation Act, 1845, any person travelling, or attempting to travel, without having paid his fare (h), and with intent to avoid payment, or knowingly and wilfully proceeding an additional distance, with intent to avoid payment of the additional fare, or knowingly and wilfully failing to quit the carriage on arriving at the point to which he has paid his fare, is liable to a penalty of not more than forty shillings, and by sect. 104 of the same Act, such a person may be apprehended and

Persons not paying their fare, &c.  
R. C. Act, s. 103.

(c) See *Manning v. Eastern Counties R. Co.*, 12 M. & W. 237.

(d) 3 & 4 Vict. c. 97, ss. 16, 17.

(e) L. R., 8 Q. B. 65; 12 L. J., M. C. 3.

(f) Regulation of Railways Acts of 1868 and 1871, 31 & 32 Vict. c. 119, s. 23,

31 & 35 Vict. c. 78, s. 14, post, vol. II.

(g) 3 & 9 Vict. c. 10, s. 156; and see also 3 & 9 Vict. c. 20, s. 154.

(h) See *L. v. Freer*, 4 E. & B. 598, and p. 514, ante.



17. *Ticket-passes,  
Orders, and  
Penalties.*

detained. The transferee of a non-transferable return ticket, which has been partly used by the transferor, is amenable to sect. 103 (i), and so is a passenger travelling by a higher class carriage than that to which his ticket entitles him (k).

Non-payment  
of fare.

The maximum penalty of forty shillings for an offence of which fraud is the essence, and which at any rate in case of repetition might perhaps more aptly be punished by imprisonment, is rather a small one. It is perhaps for this reason that the companies have endeavoured to supplement the statute by a bye-law, but as we have seen, without success.

Recovery of  
penalties under  
Railways Clauses  
Act, 1845.

The recovery of penalties under the Railways Clauses Act, 1845, 8 Vict. c. 20, is dealt with by sub-sects. 140—160 of that Act, which sections have been incorporated in subsequent railway Acts (l), but have been to some extent repealed by the Summary Jurisdiction Act, 1884, for the purpose of bringing them into harmony with the Summary Jurisdiction Acts of 1848, 1879, and 1884. For the exact extent of this repeal reference must be made to Volume II. It may be here stated that the effect of the unrepealed sections and those parts of the Summary Jurisdiction Acts which replace the repealed sections, is that—

The particulars of the offence must be published for a penalty to be recoverable (R. C. Act, 1845, s. 143).<sup>a</sup>

The penalties are recoverable before two justices of the peace (R. C. Act, 1845, ss. 3, 140).

They must be sued for within six months (S. J. Act, 1848, s. 11).

A conviction cannot be removed by *certiorari* (R. C. Act, s. 156).

A conviction may be appealed against to quarter sessions (m) (R. C. Act, s. 157) at the next practicable court after notice of appeal and recognizance by the appellant (S. J. Act, 1879, s. 31: S. J. Act, 1884, s. 6).

Distress was  
sunt.  
*R. v. Puget.*

It was held in *Reg. v. Puget*, that the penalty imposed by sect. 103 of the Railways Clauses Act, 1845, for evasion of fare was not subject to the procedure for the recovery of civil debts under sect. 35 of the Summary Jurisdiction Act, 1879 (whereby a penalty can be enforced by imprisonment only in case of ability to pay it), but to the pro-

(i) *Langdon v. Howell*, L. R., 4 Q. B. 1). 337; 48 L. J., M. C. 113; 40 L. T. 880; 27 W. R. 657.

(k) *Gillingham v. Walker*, 44 L. T. 715; 20 W. R. 896.

(l) See e. g. Act of 1868, s. 40; Act of 1871, s. 15. The penal clauses of the Railways Clauses Act have also been adapted into acts of a general character, e. g., the Waterworks Clauses Act, 1817, 10 Vict. c. 17, by s. 85. By s. 4 of the Summary Jurisdiction Act, 1884,

"a reference in any act of Parliament or document repealed" by that act, "whether incorporating or applying such enactment or otherwise, shall be construed to refer to the corresponding enactment in the Summary Jurisdiction Acts, and so far as there is no such corresponding enactment shall be repealed."

(m) Or there may be an appeal by case to the High Court under 20 & 21 Vict. c. 43, as amended by s. 33 of the Summary Jurisdiction Act, 1879.

cedure under sect. 145 and other sections of the Railways Clauses Act, whereby a penalty could be enforced by imprisonment in any case, and a rule issued to a magistrate who was willing to make an order upon the defendant, in default of appearance, for payment of money only, to hear and convict (*u*). This case was decided in 1881, since which date the Summary Jurisdiction Act, 1884, has repealed part of the enactments upon which the judgment proceeded. The reasoning of the judgment appears, however, to be equally applicable to the present law, though it must be considered doubtful how far its principle would be followed. At any rate the issue of a warrant to apprehend a defendant in default of appearance is a matter of discretion for the justices under sect. 13 of the Summary Jurisdiction Act, 1848.

The forgery of a railway pass is an offence at common law, but the mere uttering it is no offence, unless some fraud was actually perpetrated (*v*). And if a person by false pretence obtain a railway ticket from the company, which enables him to travel on the railway, this is an offence within 24 & 25 Vict. c. 96, s. 88, for which an indictment for obtaining a chattel by false pretences will lie (*w*).

Forging pass.

Obtaining ticket by false pretences.

If a railway ticket be fraudulently taken it is felony, although the ticket would have been delivered up at the end of the journey (*x*).

Stealing ticket.

A railway platform is a place of public resort within the Vagrant Act (*y*), and so is a railway carriage upon its journey (*z*), so that persons playing or betting by way of wagering or gaming "therein with any table, coin, card," &c., may be punished as rogues and vagabonds under that Act and the Vagrant Act Amendment Act, 1873, 36 & 37 Vict. c. 38 (*t*).

Platform and carriage, places of public resort within Vagrant Act.

(*u*) *Reg. v. Patel*, L. R., 8 Q. B. D. 151; 51 L. J., M. C. 9; 45 L. T. 794; 30 W. R. 336.

(*v*) *R. v. Boulton*, 2 C. & K. 601.

(*w*) *R. v. Boulton*, 2 C. & K. 617; 19 L. J., M. C. 67; 3 Cox. Cr. Cas. 576; 3 Jur. 1034. This case arose on 7 & 8 Geo. 4, c. 20, s. 53.

(*x*) *R. v. Beecham*, 5 Cox. Cr. Cas. 156.

(*y*) *Jervis, ex parte*, 20 L. J., M. C. 178.

(*z*) This seems essential; see *Freestone, ex parte*, 25 L. J., M. C. 121.

(*t*) *Langrish v. Archer*, L. R., 10 Q. B. D. 44; 52 L. J., M. C. 47; 47 L. T. 548; 31 W. R. 183; 47 J. P. 295; 15 Cox. C. C. 194.

## CHAPTER XIII.

## ARBITRATION BETWEEN RAILWAY COMPANIES.

Railway Companies Arbitration Act, 1859.

AN important Act of Parliament was passed in 1859, for the better providing for the settlement by arbitration of matters in which railway companies in the United Kingdom are mutually interested. It is called "The Railway Companies Arbitration Act, 1859." By that Act (22 & 23 Vict. c. 59), any two or more railway companies may from time to time by writing under seal agree to refer, and may refer to arbitration, any existing or future differences, questions, or other matters whatsoever in which they are mutually interested, and which they might lawfully settle or dispose of by agreement between themselves, and may delegate to the persons to whom the reference is made any power to determine the terms of any contract to be made between the companies, which the directors might lawfully delegate to any committee of themselves respectively: (Sect. 2). The companies jointly, but not otherwise, from time to time by writing under their common seals may add to, alter or revoke any agreement of reference, or any of the terms, &c., thereof: (Sect. 3). Such references are declared to be binding: (Sect. 4). Where the companies agree, the reference is made to a single arbitrator (sect. 5); otherwise, where there are two companies, the reference must be to two arbitrators, and where there are three or more companies, to as many arbitrators as there are companies: (Sect. 6). When there are two or more arbitrators, each company must by writing under their common seal appoint one, and give notice to the other companies (sect. 7); and if they fail to appoint an arbitrator within fourteen days, the Board of Trade may appoint one: (Sect. 8). The Act then provides for the appointment of arbitrators by companies, and for the supply of vacancies by the Board of Trade, and declares the appointment of an arbitrator not to be revocable: (Sects. 9—11). Provision is then made for the appointment of an umpire, and for the supply of any vacancy caused by his death, &c. (sects. 12—16); and it is enacted that where there are two or more arbitrators, if they do not, within such a time as the companies agree on, or failing such agreement within thirty days after the reference, agree on their award, the matters shall stand referred to the umpire: (Sect. 17). Power is

Reference to as many arbitrators as companies.

Umpire.

given to the arbitrators and umpire to call for books and documents, and to administer an oath to witnesses: (Sect. 18). Unless otherwise agreed by the companies, the arbitrators may proceed as they think fit, and even in the absence of the other companies, after notice: (Sects. 19, 20). Several awards may be made, and if made in due time will bind all parties: (Sects. 21, 22). Power is given to the umpire to extend the period for making his award (sect. 23); and it is provided that no award shall be set aside for irregularity or informality, but the award is to be binding on the parties, and full effect given to it by the Superior Courts: (Sects. 24—26).

Powers of  
arbitrators.

The jurisdiction of the Court is not necessarily and entirely ousted by an agreement to refer under the Act. By an agreement, afterwards confirmed by special Act, the plaintiff company agreed to construct a line, and the defendant company agreed to work the line and develop both local and through traffic thereon, and to carry over it certain specified traffic. All differences under the agreement were to be determined by a standing arbitrator, to be named by the companies in the January in each year, or, they failing, by the Board of Trade, in the February of each year. All Acts for the time being in force as to railway arbitrations were incorporated in the agreement. Differences arose by reason of the defendant company carrying over the line (as was alleged) a large portion of traffic which ought to have passed over the plaintiff's line, by other lines belonging to the defendant company. But the standing arbitrator not having been appointed, it was held that the Court had jurisdiction to interfere by injunction (a).

Ouster of juris-  
diction of Court.

And Lord Selborne observed:—

“With respect to the point about the arbitration, the burthen of excluding the jurisdiction of the Courts rests upon the defendants. There are authorities undoubtedly which show that an arbitration clause may exclude the jurisdiction; I am far from saying that it might not be argued on this clause, confirmed as it is by an act of Parliament (b), that it would exclude the jurisdiction; but I am not called upon to give a judicial opinion on that point, because the facts do not raise it.”

But either company may call upon the other to proceed to arbitration under the agreement, and the Court will leave the matter to be decided by arbitration, and, it would seem, even compel a reference in a case appearing to be more suitable for reference (c). Where

(a) *Wolverhampton and Walsall R. Co. v. L. & N. W. R. Co.*, L. R., 16 Eq. 433, per Lord Selborne for the M. R. See also *Mid Wales R. Co. v. Cambrian R. Co.* 21 L. T. 16, where three railway companies were entitled by a special act to the joint use of a station, and one of them was alleged to use the station unfairly. A bill to compel user of the station in accordance

with the act was demurred to on the ground that a joint committee of the three companies was the proper tribunal to apply to, but the demurrer was overruled.

(b) See *Caledonian R. Co. v. Greenock and Wemyss Bay R. Co.*, *infra*.

(c) *Watford and Rickmansworth R. Co. v. L. & N. W. R. Co.*, L. R., 8 Eq. 281; 17 W. R. 814.

*Arbitration  
between Railway  
Companies.*

there was an agreement between two companies for mutual running powers, which agreement stipulated that differences under it should be "settled by arbitration, as provided by the Railway Companies Arbitration Act, 1869," and one of the companies disregarded a notice from the other determining the agreement, and continued running their trains, *Malins, V.-C.*, dismissed a bill for an injunction, observing that the 26th section of the Act imposed a positive duty on the Court to give effect to the arbitration clauses (*d*).

Agreement  
confirmed by  
statute ousts  
jurisdiction.

And if the agreement to refer is so expressly confirmed by a special Act as to become a part of it, the agreement to refer is then a statutory obligation, and the jurisdiction of the Courts is clearly ousted. This was held by the House of Lords in *Caledonian R. Co. v. Greenock and Wemyss Bay R. Co.* (*e*).

Costs.

Except where it is otherwise agreed, costs are to be in the discretion of the arbitrator, and if the award does not otherwise determine, the costs of the arbitration and award are to be borne by the companies in equal shares, and in other respects the companies are to bear their own costs: (Sects. 27, 28). Lastly, provision is made for making the submission a rule of Court, and power is given to the Court to remit the matter to the arbitrator: (Sect. 29).

Railway and  
Canal Com-  
mission.

Differences between railway companies, if required or authorized by statute, or by agreement confirmed by statute (*f*) to be referred to arbitration, must, at the instance of any company party to the difference, be referred to the Railway and Canal Traffic Commission for decision in lieu of being referred to arbitration, but the consent of the Commissioners must first be obtained (*g*). If it should happen that the Board of Trade have been designated arbitrators by statute, the Board may, if they think fit, appoint the Railway Commissioners to act in their stead (*h*).

(*d*) *Llanelli Railway and Dock Co. v. L. & N. W. R. Co.*, 20 W. R. 898.

(*e*) L. R., 2 Sc. App. 347, per Lords Cairns, Chelmsford, Hatherley and Selborne.

(*f*) Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, s. 15, getting rid of the effect of *Reg. v. Midland R. Co.*, L. R., 19 Q. B. D. 540. The decision of the Court of Appeal in *G. W. R. Co. v. Waterford and Limerick R. Co.*, L. R., 17 Ch. D. 493, that an agreement providing for ar-

bitration under the act of 1859, made under a special act which made no provision for arbitration at all, did not come within the section, seems to be still law. See also *Halesowen R. Co. v. G. W. R. and Mid. R. Cos.*, 4 R. & C. T. C. 224, in which a reference was also held not to be within the section.

(*g*) Regulation of Railways Act, 1873, 36 & 37 Vict. c. 48, s. 2, vol. II.

(*h*) Board of Trade Arbitration Act, 1874, 37 & 38 Vict. c. 40, s. 6, vol. II.

## CHAPTER XIV.

THE COMBINATIONS OF RAILWAY COMPANIES AMONGST THEMSELVES  
AND WITH CANAL COMPANIES.

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1. *Running Powers.*1. *Running Powers.*

RUNNING powers over the line of any other railway company may be contracted for by any railway company. It is enacted by s. 87 of the Railways Clauses Act, 1845, 8 Vict. c. 20, that "it shall be lawful for" a company to enter into a contract with any other company "being the owners or lessees or in possession of any other railway" for the passage over the railway of any engines or carriages of any other company upon the payment of such tolls as may be mutually agreed upon, and for that purpose to contract for apportionment of tolls; the 88th section providing that no such contract shall affect any person or company not party thereto.

Permissive  
running powers.

The extent of the authority conferred by the 87th section has been already considered (ante, p. 56).

The section is permissive only, and is frequently supplemented by special acts giving compulsory running powers. Differences arising under these special acts have been referred to the Railway Commissioners in the cases mentioned in the notes below, the questions involved relating to the amount of remuneration to be paid (*a*), the apportionment of receipts (*b*), the conditions of exercise of the powers (*c*), the powers of a tramway company to use horse power (*d*), interference with local traffic (*e*), the fitness of a locomotive (*f*), the

Compulsory  
running powers.

(a) *Odermarthen and Cardigan R. Co. v. Central Wales and Carmarthen Junction R. Co.*, 2 Nev. & Mac. 23; *Cannbrian R. Co. v. L. & N. W. R. Co.*, ib. 311 (rebate on special traffic); *South Devon R. Co. v. Devon and Cornwall R. Co.*, ib. 318 (alteration of broad gauge line and user of extra rail); *Midland R. Co. v. North R. Co.*, ib. 366.

(b) *Caledonian R. Co. v. North British R. Co.*, 2 Nev. & Mac. 271 (season and

traders' tickets).

(c) *Dala and Dolgelly R. Co. v. Cambrian R. Co.*, 2 Nev. & Mac. 47.

(d) *Swansea Improvement Tramways Co. v. Swansea and Mumbles R. Co.*, 3 Nev. & Mac. 339, aff. in High Court, ib. 354, and in Court of Appeal, ib. 363.

(e) *Caledonian R. Co. v. Glasgow and South Western R. Co.*, ib. 395.

(f) *East and West Junction R. Co. v. Northampton and Banbury Junction R.*

1. Running Powers.

construction of an agreement (*g*), and the construction of the special Act (*h*).

The facilities necessary to the exercise of running powers are not under ordinary circumstances such facilities as an ordinary company are bound to provide, under s. 2 of the Railway and Canal Traffic Act, 1854 (*i*), but in one case the Commissioners ordered as one of such facilities the working of signals in aid of the block system (*k*).

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## 2. Working Agreements.

Maintenance.

The ordinary working agreement confers upon the working company the exclusive possession and right of maintenance of the railway works (*l*).

R. G. Act, 1863,  
s. 22.  
Restriction upon  
working agree-  
ments.

By the Railways Clauses Act, 1863, as amended by the Regulation of Railways Act, 1873 (*m*), certain restrictions are placed on working agreements between companies. Thus, where two or more companies are authorized by a special act, passed after 28th July, 1863 (*n*), and incorporating Part III. of the Railways Clauses Act, 1863, to agree (*o*) among themselves with respect to all or any of the following purposes, namely:—

- “The maintenance and management of the railways of the companies respectively, or any one or more of them, or any part thereof, respectively, and of the works connected therewith respectively, or any of them ;
- “The use and working of the railways or railway, or of any part thereof, and the conveyance of traffic thereon ;
- “The fixing, collecting and apportionment of the tolls, rates, charges, receipts and revenues levied, taken or arising in respect of traffic.”

(*o*), 2 Nev. & Mac. 293 (Fairlie engine not suit).

(*g*) *North British R. Co. v. Caledonian R. Co.*, 3 Nev. & Mac. 273.

(*h*) *G. W. R. Co. and Llanelli R. Co. v. Central Wales, &c. R. Co. and L. & N. W. R. Co.*, 4 R. & C. T. C. 358.

(*i*) See *Strindon, &c. R. Co. v. G. W. R. Co.*, 4 R. & C. T. C. 173.

(*k*) *G. W. R. Co. and Mid. R. Co. v. Bristol Port R. & Pier Co.*, 5 R. & C. T. C. 94 (dub. Mr. Comm. Miller).

(*l*) See *Sevenoaks, &c. R. Co. v. L. C. & D. R. Co.*, 11 Ch. D. 625; 48 L. J., Ch. 513, in which it was held by Jessel, M.R., that the working company could under their powers to “maintain and work” make improvements, and that the other company under the original powers of their special act to “make and maintain” the works, had not even power to erect stone steps in the station yard of

Maidstone Station.

(*m*) The Act of 1873, s. 10, substituted the Railway Commissioners for the Board of Trade, and the Railway and Canal Traffic Act, 1888, substitutes the Railway and Canal Commission for the Railway Commissioners, as the body to approve a working agreement under a special act, which term includes an agreement by virtue of a special act. *Huddersfield Corporation and Chamber of Commerce v. G. N. R. Co. and Manchester, Sheffield and Lincolnshire R. Co.*, 3 Nev. & Mac. 561; aff. in High Court, 50 L. J., Q. B. 587.

(*n*) As to special act, passed before the Railways Clauses Act, 1863, see 2nd Report of Railway Commissioners, p. 6, and *Greenock and Wemyss Bay R. Co. v. Caledonian R. Co.*, 2 Nev. & Mac. 132.

(*o*) By sect. 29, any alteration of an agreement “shall be deemed an agreement.”

Before the companies enter into the agreement, public notice by advertisement of their intention to do so must be given by them, or one of them, in a form to be approved by the Railway and Canal Commission, and this notice must set forth within what time and in what manner any company or person aggrieved by the proposed agreement, and desiring to object thereto, may bring the objection before the Commissioners.

Public notice of intention to enter into working agreement.

When made, the agreement will not, save so far as authorized by the Railways Clauses Act of 1845 (p), or some other general statute or law, have any operation until sanctioned at a general meeting, to be convened as prescribed by the act, by three-fifths of the shareholders entitled to vote; and it will have no operation until approved by the Commissioners; nor will it affect the tolls, &c., but all persons and companies will, notwithstanding the agreement, be entitled to the use of the railways of the companies parties to the agreement, on the same terms and on payment of the same tolls, &c., as they would be if the agreement had not been entered into: (Sect. 25.)

Approval of agreement by shareholders, s. 25;

by Railway Commission, s. 25.

For the purposes of the agreement, the companies parties to it may appoint a joint committee, composed of such number of the directors of each company as the companies think proper, and may delegate to such committee such of the powers of the companies as they think necessary.

Joint committee for purposes of agreements.

At the expiration of the first and every subsequent period of ten years, the agreement may be revised and modified by the Commissioners: (Sect. 27.)

Modification of agreements by Railway Commission.

It appears that the Commissioners have regarded their duties in relation to the approval of working agreements as being—(1) To ascertain that the companies have the power to enter into the agreements submitted for approval; (2) To ascertain whether, if entered into, such working agreements will be advantageous to the interests of the public; and (3) To ascertain that their own powers under the Railways Clauses Act, 1863, and the Regulation of Railways Act, 1873, are not affected by the proposed agreement (q).

Since their establishment in 1873, very many working agreements have come under the consideration of the Railway Commissioners, sometimes upon an application for revision, but more frequently upon differences between the agreeing companies being referred to the Commissioners for arbitration. The cases as to revision are referred to in the note below (r).

(p) See sect. 87, sect. 1, ante.

(q) Browne's Practice, p. 100.

(r) *Greenock and Wemyss Bay R. Co. v. Caledonian R. Co.* (No. 1), 2 Nev. & Mac. 132, 136; *Sirhowy R. Co., In re*, 2 Nev. & Mac. 264; *Huddersfield Corporation and Chamber of Commerce v. Great Northern R.*

*Co. and Manchester, Sheffield and Lincolnshire R. Co.*, 3 Nev. & Mac. 564, and 4 R. & C. T. C. 41; *Tuff Vale and Treferig Fulley R. Co.'s Working Agreement, In re*, 4 R. & C. T. C. 64; *Clonmel Traders and Southern R. Co. v. Waterford and Limerick R. Co.*, 4 Nev. & Mac. 92.



### 2. Working Agreements.

Revision of working agreements.

It may be particularly mentioned that the Commissioners did not refuse to approve an agreement on the ground of its tendency to give to one company competitive traffic of which another company are also carriers (s).

But in the important *Huddersfield case* (t) the Commissioners ordered a clause that "neither company shall make any bargain with any other company or do any other act directly or indirectly to affect injuriously the traffic of the other company or to prejudice this agreement without the consent of the other company," to be either struck out or modified by the addition of a proviso that neither of the companies should be prevented from agreeing to any through rate, or agreeing with any other company as to conveyance of traffic by any future route.

Construction of working agreement.  
"Fairly to develop traffic."

As to construction of working agreements the Commissioners held that on an agreement fairly to develop the traffic of a line, the working company need not work the line as a trunk line of their own (u). that the obligation to work efficiently remains the same, whether the working expenses of the working company are above or below the share of the receipts which they receive as remuneration (x), and that the worked line must be treated fairly and equally in respect of correspondence of trains, advertisement of routes over it which competes with the working company, and booking facilities (y).

"Through traffic."

"Through traffic" in an agreement to develop and accommodate it means traffic for which the railway provides the shortest and most convenient route, and not that which may be more conveniently or economically carried by another route (z).

Application to Parliament.

Where the agreement was that each company should be at liberty to apply to Parliament for power to construct lines in its own district, but neither company should promote or support any line in the district of the other, it was held by the Railway Commissioners upon a reference that the restriction did not apply to districts occupied by both railways (a).

Division of receipts.

Where it was provided that the gross receipts of traffic on the owning company's line should be equally divided, deducting one moiety of station to station terminals, and also mileage proportion and terminals due to any other company in respect of such traffic,

(s) *Sirhanry R. Co., In re*, 3 Nev. & Mac. 264. (See judgment, 6th ed. of this work, p. 563.)

(t) *Huddersfield Corporation and Chamber of Commerce v. Great Northern R. Co. and Manchester, Sheffield and Lincolnshire R. Co.*, 3 Nev. & Mac. 41.

(u) *L. B. & S. C. R. Co. v. East London R. Co.*, 3 Nev. & Mac. 103.

(x) *Dublin and Meath R. Co. v. Midland Great Western of Ireland R. Co.*, 3 Nev.

& Mac. 379; 4 R. & C. T. C. 145; 5 R. & C. T. C. 142 (running of additional train).

(y) *Gloucester Traders' and Southern R. Co. v. Waterford and Limerick R. Co.*, 4 R. & C. T. C. 92.

(z) *Eastern and Midlands R. Co. v. Midland R. Co.*, 5 R. & C. T. C. 235.

(a) *Calcutt R. Co. v. North British R. Co.*, 2 Nev. & Mac. 235; and see too *Midland R. Co. v. G. W. R. Co.*, ib. 298.

the Railway Commissioners held on a reference that the receipts, subject to such division, must comprise one moiety of the two terminals included in gross receipts, and not merely one moiety of terminals at the owning company's end of the journey; also that "any other company" meant any third company and not the working company (*b*).

In calculating the cost of working a section of a railway as an integral part of the whole system, the proportion of locomotive expenses and cost of carriage and waggon repairs to be borne by the section should be arrived at by taking the mean proportion between the proportions of the train mileage on the system and the traffic receipts on the section to the traffic receipts on the system respectively (*c*).

Calculation of  
working  
expenses.

Where an agreement contained no reference to new expenses not chargeable to revenue, the Commissioners held that they had no power under the agreement to decide which party ought to bear the outlay (*d*).

Capital  
expenses.

The Commissioners heard a reference, although litigation upon the matters referred had been commenced in the Court of Session in Scotland (*e*).

Concurrent  
jurisdiction.

Where the agreement provided for regulation of working by direction of a joint committee, the Commissioners declined to hear a reference unless some direction of that committee had been given (*f*).

Function of  
joint committee.

Where a station is referred to in an agreement, an obligation with respect to it cannot be transferred to a new station built in the same town (*g*).

New station.

Where traffic was to be distributed between two routes the Commissioners divided it with regard to position of localities and their vicinity to each route, to the interest of the public, and to the interests of the companies concerned (*h*).

Distribution of  
traffic.

By the Railway Companies Powers Act, 1864, certain facilities were given to companies desirous of entering into an agreement with respect to each of the matters above-mentioned (*i*), and also with respect to

Sanction of  
agreement by  
Board of Trade.

The joint ownership, maintenance, management and use of a station or other work, or the separate ownership, &c., of several parts of a station or other work.

(*b*) *Harborne R. Co. v. L. & N. W. R. Co.*, 2 Nev. & Mac. 326.

(*c*) *Serenoaks, &c. R. Co. v. L. C. & D. R. Co.*, 3 Nev. & Mac. 63.

(*d*) *Midland Great Western of Ireland Co. v. Dublin and Marth R. Co.*, 4 R. & C. T. C. 145: an apparatus for heating water for the comfort of passengers was held a revenue charge.

(*e*) *Portpatrick R. Co. v. Caledonian R.*

*Co.*, 3 Nev. & Mac. 189.

(*f*) *Limerick and Kerry R. Co. v. Waterford and Limerick R. Co.*, 5 R. & C. T. C. 87.

(*g*) *Greenock and Wemyss Bay R. Co. v. Caledonian R. Co.*, 5 R. & C. T. C. 206.

(*h*) *Girvan and Portpatrick R. Co. v. Glasgow and South Western R. Co.*, 5 R. & C. T. C. 215.

(*i*) *Supra*, "Working agreements."

2. *Working Agreements.*

See p. 108, *note*.

By that act, in any such case, a company may, upon complying with the requisites of the act, obtain from the Board of Trade a certificate, which has the same force and operation as a special act of Parliament.\*

The Board of Trade may also (under the Railways Construction Facilities Act, 1864) issue a certificate empowering two or more companies to jointly make a work connected with or for the purposes of a railway.†

† See p. 410, *ante*.

3. *Agreement to charge Equal Fares.*

*3. Agreements to charge equal Fares to competitive Stations.*

Agreement to exclude competition not illegal.

"The simplest and least complex form of combination" between railway companies is, it is said, "an arrangement for equal rates and fares, and, in some cases, for equal speed, wherever there is competitive traffic." And it is also said that "this arrangement appears to be now universal, and can be carried into effect by the companies without reference to Parliament or other authority, and even without previous notice to the public" (k). There appears to be no doubt that an agreement is not illegal simply because its object is to exclude competition (l). Such an agreement has nothing in it of the character of a partnership, and is open to railway companies as well as to other traders. It is, however, not uncommon for an "agreement to charge equal fares" to find its way into the schedule of a special act. Instances of this are to be found in the Great Western Railway (West Midland Amalgamation) Act, 1863, and the London, Brighton and South Coast Railway Act, 1870, 33 & 34 Vict. c. clv.

Form of agreement excluding competition.

The latter agreement (between the London, Brighton and South Coast and the South Eastern Companies), was as follows:—

"As regards competitive traffic, the companies shall from time to time agree on the service of the trains and the rates and fares, and neither of them shall run any train or charge any rate or fare except in accordance with the agreement for the time being in force, nor shall either company divert any traffic, or do any other act to the prejudice of the other company, or which shall be contrary to the fair and true spirit of this agreement, which is based upon the principle of avoiding unnecessary competition between the companies in respect of the traffic between the competitive stations, having regard to the requirements of the public from time to time, and to the ability of, and the mode adopted by, each company for conducting such traffic as the same existed on the said 1st day of February, 1869."

(k) Report of Amalgamation Committee, 1872, p. xxy.

(l) See per Wood, V.-C., in *Hart v. L. & N. W. R. Co.*, 2 J. & H., at p. 116. A "joint-purse" agreement, however, as to

which see p. 57, *ante*, might perhaps be set aside on an application by the Attorney-General under 7 & 8 Vict. c. 85, s. 17.

The agreement, which is by the 10th section of the act confirmed and declared binding, also provides that "if it shall be found practicable and desirable, arrangements shall be made between the companies for the division between them of the continental traffic in shares to be agreed upon," and that "the companies shall join in any application to Parliament for confirmation of the agreement that may be necessary or proper."

Agreement under special act as to continental traffic.

The former of these agreements was much discussed before the Railway Commissioners in *Midland R. Co. v. Great Western R. Co. (n)*. In this case the two companies agreed to carry passenger traffic between competitive stations at equal fares, the amount of such fares to be determined in case of difference by arbitration. The Railway Commissioners upon a reference—arising out of the discontinuance of second class fares by the Midland—under sect. 8 of the Railway Regulation Act, 1873, held that the agreement, so far as it neutralized competition, was to be construed strictly; that in defining "competitive stations" a difference of distance was not material, and that particular places on the lines of both companies, though the course between them might be much more circuitous in the one case than in the other, were competitive in the sense of the agreement; but that the company which had the chief control of the traffic, or to which the traffic mainly or properly belonged, by reason of having the more direct route, or the route being on their main line, should have the control in fixing the amount of the governing rates in the absence of any agreement or special circumstances to the contrary.

*Midland R. Co. v. G. W. R. Co.*  
Strict construction of agreement by Railway Commissioners.

#### 4. Leases of Railways.

4. Leases of Railways.

The maintenance of competition between railways *inter se* by the restricting of railway leases has been a great care of the Legislature. A general section of the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20, s. 112), merely provides that where a company are authorized by their special act to lease their railway, the lease must contain all usual covenants on the part of the lessee for keeping the railway in repair; but by a later act of the same session (8 & 9 Vict. c. 96) it was enacted that no railway company might, by virtue of any act passed in that session, grant or accept a lease of any railway except under a

Leases of railways.

(m) 2 Nev. & Mac. 83. As in many cases there was practically no more competition than if only one route existed, the application was, on the hearing, narrowed to places where the two companies could

effectively compete. The considered judgment of the Commissioners is printed at length in the 8th edition of this work, at pp. 566—570.

4. Leases of  
Railways.

distinct provision of a special act specifying by name the railway to be leased, and the company to whom the transfer should be made.

Working agreements (see ante, sect. 2) are frequently carried out under leases, and the mode in which the company taking the lease works the leased lines frequently gives rise to disputes with the company by which the lease is granted. Thus, where the L. & S. W. R. Co. worked the Staines, Wokingham and Woking line under a lease providing that the lessors should execute all such additional works, if any, in connection with the demised line, and for landowners and others as might from time to time be required in pursuance of the acts from time to time in force; but that the lessees should maintain and repair such works when executed, differences arose upon the construction of this provision, which the Railway Commissioners upon a reference held to extend to new signals for putting the block system in operation (*n*). In another case a special act enacting that the lessees should provide all proper and sufficient locomotive power and rolling stock for the working of the leased line was held by the High Court to be enforceable at the suit of traders using the leased line (*o*). Where a leased line was worked under an agreement providing that the lessee company should place to the account of the lessor company a due mileage proportion of the gross receipts derived from through traffic, it was held by the Railway Commissioners upon a reference, that as to joint traffic whether the lessee company should be allowed to reckon mileage according to the distance of the route taken, or according to the distance of the shortest route, depended upon what was reasonable under the circumstances; and that as to through traffic, the receipts for which passed through the Clearing House, the lessor company were entitled to receive the same proportion as they would have received if they had been an independent company (*p*).

5. Acquisition of  
Canals.

*5. Acquisition and Management of Canals by Railway Companies.*

Working agree-  
ments with  
canal companies.

It is provided by the Regulation of Railways Act, 1873, s. 16, that no railway company, unless expressly authorized thereto by act passed prior to that act, may without the sanction of the Railway Commissioners "enter into any agreement whereby any control over the right to interfere in or concerning the traffic carried over or rates

(*n*) *L. & S. W. R. Co. v. Staines, &c. R. Co.*, 3 Nev. & Mac. 48.

(*o*) *Watkinson v. Wokingham, &c. R. Co.*, 3 Nev. & Mac. 5, 161.

(*p*) *Salisbury and Dorset R. Co. v. L. & S. W. R. Co.*, 3 Nev. & Mac. 314.

or tolls levied on any part of a canal is given to the railway company or any persons managing any railway."

Every railway company owning or having the management of a canal is also by s. 17 of the same act bound to maintain the canal in thorough repair and good working condition.

Management of canals by railway companies owning them.

The Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, contains a series of sections (ss. 36 to 46) directed to the objects of controlling railway companies in their management of canals and of strengthening canal companies as owners of independent lines of communication. Of these the most important is the 38th, which gives to the Railway and Canal Commission control over canal tolls, when levied by a railway company, in the following terms :—

Powers of Railway and Canal Commission over canal tolls levied by railway company.

Where a railway company, or the directors or officers of a railway company, or any of them, or any persons on their behalf, have the control over or the right to interfere in or concerning the traffic conveyed, or the tolls, rates, or charges levied on the traffic of or for the conveyance of merchandise on a canal, or any part of a canal, and it is proved to the satisfaction of the Commissioners that the tolls, rates, or charges levied on the traffic of or for the conveyance of merchandise on the canal are such as are calculated to divert the traffic from the canal to the railway, to the detriment of the canal or persons sending traffic over the canal or other canals adjacent to it—

(1.) The Commissioners may, on the application of any person interested in the traffic of the canal, make an order requiring the tolls, rates, and charges levied on the traffic of or for the conveyance of merchandise on the canal, to be altered and adjusted in such a manner that the same shall be reasonable as compared with the rates and charges for the conveyance of merchandise on the railway:

Order for adjustment of canal tolls by company itself.

(2.) If within such time as may be prescribed by the order of the Commissioners, the tolls, rates, and charges levied on the traffic of or for the conveyance of merchandise on the canal are not altered and adjusted as required by such order, the Commissioners may themselves by an order make such alterations in and adjustment of the tolls, rates, and charges levied on the traffic of or for the conveyance of merchandise on the canal as they shall think just and reasonable, and the tolls, rates, and charges as altered and adjusted by the order of the Commissioners shall be binding on the company or persons owning or having the control over the traffic of, or the tolls, rates, and charges levied on the traffic of, or for the conveyance of merchandise on the canal:

Order of adjustment by Commissioners on failure of company.

(3.) No application shall be made to the Commissioners under this section until the Board of Trade have certified that the applicant is a fit person to make the application, and that the application is a proper one to be submitted for the adjudication of the Commissioners; and no order shall be made by the Commissioners under this section unless notice of the application has been served upon such company and persons, and in such manner as the Board of Trade may direct:

Locus standi of applicant for order, &c.

(4.) The Commissioners may at any time upon the application of any company or person affected by any order made under this section, and after notice to and hearing such companies and persons as the Commissioners may by any general rules or special order prescribe, rescind or vary any order made under this section.

Variation of order.

5. *Acquisition of Canals.*

Misapplication  
of railway funds  
for canal  
purposes.

The 42nd section of the same Act prohibits any railway company or director, or officer of a railway company, from applying without express statutory authority any part of the company's funds for the purpose of acquiring for the company, directly or indirectly, any "canal interest," *i.e.*, shares in the capital of a canal company, or any interest of any kind in a canal company or canal—the "canal interest" to be forfeited to the Crown in the event of any contravention of these provisions, which it may be observed have no retrospective effect so as to compel canal interests acquired by or for a railway company before the commencement of the Act to be parted with.

Further applica-  
tion of Act of  
1888 to canal  
companies.

The same Act applies the whole of its second part (which relates to through traffic, undue preference, &c.), to canal companies (sect. 36), extends the Railway and Canal Traffic Act, 1854, to any person whose consent is required to any variation of rates (sect. 37), provides for every canal company sending to the Board of Trade returns showing the capacity of the canal for traffic and the capital revenue, expenditure, and profits of the canal company (sect. 39), gives the Board of Trade control over canal bye-laws (sect. 40), provides for inspection of canals by the Board of Trade (sect. 41), empowers canal companies to agree with each other for through tolls (sect. 43), and to establish a canal clearing system (sect. 44), and empowers the Board of Trade to authorise the abandonment of unnecessary or derelict canals (sect. 46).

Canal companies  
may vary tolls,  
and act as  
carriers.

cases of canals.

Two acts passed in 1845 (8 & 9 Vict. c. 28, and 8 & 9 Vict. c. 42) authorize canal companies to vary their tolls and to become carriers upon their canals, with the express object of "obtaining greater competition for the public advantage" (*q*). And, with a similar object, an act passed in 1858 (21 & 22 Vict. c. 75) prohibits canal companies, being also railway companies, from accepting a lease of the undertakings of other canal companies.

Recommen-  
dations of  
Amalgamation  
Committee, 1872.

It appeared in 1872 that of the 4,000 miles of water communication in Great Britain about 1,300 had been amalgamated with, and about 250 were held on lease by, railway companies (*r*). The Amalgamation Committee of 1872 recommended on this subject—

"1. That no inland navigation now in the hands of a public trust shall be transferred to, or placed under the control of, a railway company, and that if the trustees of an inland navigation or canal company apply to parliament for power compulsory to purchase a canal from a railway company, such purchase should be favourably regarded by Parliament. 2. That the utmost facilities shall be

(*q*) See the text of these statutes, Chitty's Statutes, tit. "Canals;" Lely's "Railway and Canal Traffic," pp. 138—149; and

Browne's "Practice before the Railway Commissioners," pp. 263—275.

(*r*) Report of Amalgamation Committee, p. xx.

given for the amalgamation of adjoining canals with one another or with adjoining inland navigations. 3. That no canal shall be transferred to or placed directly or indirectly under the control of any railway company, nor shall any temporary lease of any canal to a railway company be renewed, until it has been conclusively ascertained that the canal cannot be amalgamated with or worked by adjacent canals, or by a trust owning an adjacent inland navigation" (s).

### 6. Amalgamation.

The legal rights and liabilities of the amalgamated company depend in a great measure upon the powers, &c. conferred upon them by their act for amalgamation. The question, how far an amalgamated company was bound by a covenant entered into with a private landholder by one of the companies previous to amalgamation, has been discussed in the House of Lords, in a case already referred to (t), in which it was decided that the company *was* bound. It has also been held in the House of Lords, that costs cannot be recovered against a shareholder in a company which has been unlawfully amalgamated with another company (u).

*G. Amalgamation.*  
Rights and liabilities of amalgamated company.

With regard to tolls, when railways are amalgamated, they are to be calculated at such rates as if the amalgamated railways had originally formed one line of railway: (Railways Clauses Act, 1845, s. 91).

Certain important provisions of the Railways Clauses Act, 1863, with respect to amalgamation, apply where two or more railway companies, respectively incorporated either before or after 28th July, 1863, are amalgamated by a special act passed after that date, and incorporating Part V. of that act. By sect 37 of that act (26 & 27 Vict. c. 92), companies are deemed amalgamated by a special act—

Provisions of Railways Clauses Act, 1863, as to amalgamation.

"(1.) Where by the special act two or more companies are dissolved and the members thereof respectively are united into and incorporated as a new company :

Definition of amalgamation

"(2.) Where by the special act a company or companies is or are dissolved, and the undertaking or undertakings of the dissolved company or companies is or are transferred to another existing company, with or without a change in the name of that company."

The undertakings of the dissolved companies are vested in the amalgamated company, and the special acts relating to the dissolved

Construction of acts of dissolved company.

(s) *Ib.* p. xxiii.

(t) *Edinburgh and Glasgow L. Co. v. Campbell*, 9 L. T. 157.

(u) *Midland Great Western R. Co.*

(*Ireland*) *v. Leuch*, 8 H. L. C. 872; and see this case as to what is an informal exercise of a power to amalgamate.



6. *Amalgamation.* — company are to be read as if the name of the amalgamated company had been used therein : (Sects. 38, 39). Debts due from or to the dissolved companies are payable by or to the amalgamated company : (Sect. 40). Actions do not abate : (Sect. 43). Officers of the dissolved company become officers of the amalgamated company, and so continue until removed (a) : (Sect. 49). Resolutions of any general meeting, &c., so far as applicable, remain in force until revoked : (Sect. 51). Bye-laws, &c., remain in force for twelve months, or until other bye-laws are made : (Sect. 54). And, generally, everything done before amalgamation is as valid as if the amalgamating act had not passed : (Sect. 55). The act of 1863 is printed at length in Vol. II.

Report of Select Committee on Amalgamation.

The introduction of certain amalgamation bills during the Session of 1872 led to the appointment of a Joint Select Committee, whose report, issued in 1872, will be found to deal exhaustively with the subject. In accordance with this report, amalgamation bills are now submitted to a Joint Select Committee of both Houses of Parliament. The Committee of 1872 concluded that "past amalgamations had not brought with them the evils which had been expected;" that combination between railway companies is increasing, and is likely to increase whether by amalgamation or otherwise, and that "it is impossible to lay down any general rules determining the limits or character of future amalgamations."

We find the Committee saying on this subject (Report, p. xviii):—

"Committees and commissions carefully chosen have for the last thirty years clung to one form of competition after another; it has nevertheless become more and more evident that competition must fail to do for railways what it does for ordinary trade, and no means have yet been devised by which competition can be permanently maintained. In spite of the recommendations of these authorities, combination and amalgamation have proceeded at the instance of the companies without check and almost without regulation. United systems now exist, constituting by their magnitude and by their exclusive possession of whole districts monopolies to which the earlier authorities would have been most strongly opposed. Nor is there any reason to suppose that the progress of combination has ceased, or that it will cease until Great Britain is divided between a small number of great companies."

(a) As to compensation to officers under a special act, see *Druff v. Cobbold*, 30 L. T. 597.

## CHAPTER XV.

## ARRANGEMENTS BY RAILWAY COMPANIES UNABLE TO MEET THEIR ENGAGEMENTS.

THE Railway Companies Act, 1867 (*a*), contains provisions of importance for the benefit of railway companies unable to meet their engagements. The 4th section (*b*), after providing that rolling stock may not be taken in execution by a judgment creditor—a provision which continues to apply, although the railway be closed for traffic (*c*),—enacts that the judgment creditor “may obtain the appointment of a receiver, and, if necessary, of a manager of the undertaking of the company (*d*), on application by petition in a summary way to the Court of Chancery in England (*e*) or Ireland (*f*), according to the situation (*g*) of the railway of the company, and directs “that all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under direction of the Court, in payment of the debts (*h*) of the company, and otherwise, according to the rights and priorities of the persons for the time being interested therein; and on payment of the amount due to every such judgment creditor, the Court may, if it think fit, discharge such receiver, or such receiver and manager.”

The new rights given by this section are independent of the question whether or not the company has rolling stock. The appointment of a receiver or manager is a matter of right wherever the judgment creditor is unpaid; if the company is conducting its own traffic arrangements the appointment of a manager is “necessary;” the directors will ordinarily be appointed managers; and the

(*a*) 30 & 31 Vict. c. 127, vol. II., “Statutes,” &c.

(*b*) Originally temporary, but made perpetual, after having been continued from time to time, by 35 & 36 Vict. c. 31.

(*c*) *Midland Waggon Co. v. Potteries R. Co.*, L. R., 6 Q. B. D. 36; 50 L. J., Q. B. 6.

(*d*) A dock company authorized to construct a railway is within the act. *Great Northern R. Co. v. Tichborne*, L. R., 13 Q. B. D. 320; 32 W. R. 559; *East and West India Dock Co.*, *In re*, 59 L. T. 237

—C. A.

(*e*) Chancery Division of the High Court, Jud. Act, 1873, s. 34.

(*f*) Chancery Division of the High Court, Jud. (Ireland) Act, 1877, s. 86.

(*g*) As to Scotland, see Railway Companies (Scotland) Act, 1887, 30 & 31 Vict. c. 126, s. 4.

(*h*) For distinction between “outgoings” and “debts,” see *Narves and Kingscourt Railway*, *In re*, *Price*, *Ex parte*, 17 L. R., Ir. 398.

*Railway Companies Act, 1867.*

only evidence necessary to support an application for a manager is an affidavit by the judgment creditor that he is such creditor, and that his debt is unsatisfied, and the company is carrying on its own business in the ordinary way. All this was decided by the Court of Appeal in *Manchester and Milford R. Co., In re, Cambrian R. Co., Ex parte (i)*. If a company has not commenced to acquire lands or to construct its railway, it has not an "undertaking" within the meaning of the section (*h*).

A judgment creditor obtaining a receivership order obtains no priority over other creditors; a receiver will not be appointed until all the creditors of the company have been satisfied, and therefore the section neither contemplates nor permits making of successive receivership orders (*l*). The 6th section is as follows:—

30 & 31 Vict.  
c. 127, s. 6.  
Preparation and  
filing of scheme  
of arrangement.

"6. Where a company are unable to meet their engagements with their creditors, the directors may prepare a scheme of arrangement between the company and their creditors (with or without provisions for settling and defining any rights of shareholders of the company as among themselves, and for raising, if necessary, additional share (*m*) and loan capital, or either of them), and may file the same in the Court of Chancery in (*n*) England or in Ireland, according to the situation of the principal office of the company, with a declaration in writing under the common seal of the company, to the effect that the company are unable to meet their engagements with their creditors, and with an affidavit of the truth of such declaration made by the chairman of the board of directors, and by the other directors, or the major part in number of them, to the best of their respective judgment and belief."

Stay of actions  
&c.

After the filing of the scheme, the Court may, on the application of the company, restrain any action (*o*) against the company, on such terms as the Court thinks fit: (Sect. 7).

Notice of the filing of the scheme must be published in the Gazette (*p*); and after such publication, no execution, attachment or other process against the property of the company is available without leave of the Court (*q*): (Sects. 8, 9).

Assent by mort-  
gagees, &c.

The scheme is deemed assented to by mortgagees or bondholders, when it is assented to in writing by three-fourths in value of such persons, and by the holders of debenture stock, when it is assented

(i) L. R., 14 Ch. D. 615; 40 L. J., Ch. 365; 42 L. T. 714.

(h) *Birmingham and Lichfield Junction R. Co., In re*, L. R., 13 Ch. D. 155; 50 L. J., Ch. 594; 45 L. T. 164; 29 W. R. 908.

(l) *Morley Co., In re*, 36 W. R. 372—C. A.

(m) "Share" includes stock: sect. 3. But semble, the words "additional share and loan capital" do not extend to raising substitutional share and loan capital: *Re Bristol and North Somerset R. Co.*, 37 L. J., Ch. 851; L. R., 6 Eq. 448.

(n) Now the Chancery Division of the High Court of Justice: Judicature Act,

1873, s. 34.

(o) Proceedings by unpaid vendors of land may, in a proper case, be stayed under sect. 7. See *Re Cambrian R. Co.*, L. R., 3 Ch. 278.

(p) "Gazette" means, with respect to England, the London Gazette, and, with respect to Ireland, the Dublin Gazette: Sect. 3.

(q) In *Re Devon and Somerset R. Co.*, L. R., 6 Eq. 610; 37 L. J., Ch. 914, Giffard, V.-C., held that this section enabled the Court to restrain a creditor who had recovered judgment in *scire facias* against a shareholder under 8 Vict. c. 16, s. 36, from issuing execution.

to in writing by three-fourths in value of the holders of such stock, and by the holders of a rent-charge, when it is assented to in writing by three-fourths in value of such holders: (Sects. 10, 11). By guaranteed or preference shareholders the scheme is assented to as follows:—If there is only one class of guaranteed or preference shareholders, then, by three-fourths in value of that class; and if there are more classes of guaranteed or preference shareholders than one, then by three-fourths in value of each such class: (Sect. 12). Lastly, ordinary shareholders' assent at an extraordinary general meeting of the company, specially called for that purpose: (Sect. 13). If the company be lessees of a railway, the scheme is deemed assented to by the leasing company through the consent of its shareholders in similar proportions: (Sect. 14). It is expressly provided that the assent of any class of shareholders or mortgagees, or of a leasing company, or holders of debenture stock, "shall not be requisite in case the scheme does not prejudicially affect any right or interest of such class or company" (r): (Sect. 15).

Assent by  
holders of rent-  
charge, &c.  
Assent by share-  
holders.

The 16th and 17th sections provide for the confirmation of the scheme of arrangement by the Court.

The scheme when confirmed is enrolled in the Court, and the provisions thereof have the like effect as if they had been enacted by Parliament: (Sect. 18). Notice of the confirmation and enrolment must be published in the Gazette, and the company must keep at their principal office printed copies for public sale, under a penalty of 20*l.* and a continuing penalty of 5*l.* a day: (Sects. 19, 20).

Enrolment,  
effect and publi-  
cation of scheme.

Sect. 22 is a general clause, enabling the Lord Chancellor, &c. to make General Orders for the regulation of the practice of the Court of Chancery under the act (s).

General Orders.

The effect of these clauses was much considered in 1868, in the case of *Re Cambrian R. Co.* (t), in which it was held by Lord Cairns, L. J., upon appeal from Wood, V.-C., that the scheme was not, under sect. 18, binding upon unpaid landowners or general creditors of the company, but only on persons who have assented thereto or are members of classes which have become bound by the assent of the requisite majorities; that the Court has jurisdiction under sects. 7 and 9 to restrain proceedings by unpaid landowners or

*Re Cambrian  
Railway Com-  
pany's Scheme.*  
Scheme of  
arrangement not  
binding on  
unpaid land-  
owners, &c.

(r) In *Re Cambrian R. Co.*, L. R., 3 Ch. at p. 281, Wood, V.-C., said, "It is rather curious, and it shows some degree of haste in the framing of the act, that there is no clause that I can find saying that these assents are required, except by inference, when it says the assents shall be deemed to be given, and then that no other consent shall be required: upon which one is inferentially led to suppose that all

the consents previously spoken of are required. It is hastily framed, but the meaning of the Legislature is clear by inference."

(s) See the General Orders made under this section, printed at length in vol. II., "Statutes," &c., after the statute.

(t) L. R., 3 Ch. 278; 37 L. J., Ch. 409. See also *Re Bristol and North Somerset R. Co.*, 37 L. J., Ch. 851; L. R., 6 Eq. 448.

*Railway Com-  
pact Act, 1867.  
Cambrian  
Co.*

general creditors during the maturing of a scheme, but will not do so unless the scheme makes reasonable provision for the payment of the claims of such landowners and creditors; and that sect. 23 does not take away the jurisdiction of the Court as to landowners. The case has been so frequently referred to as an authority, that it is worth while to present it at some length.

The scheme of arrangement filed by the company on 30th October, 1867, contained the following provisions:—

*Article 3.* "The capital sums of the mortgages, in class A. in the schedule, shall be payable on the 1st of January, 1873, and not before."

*Article 5.* "The company shall be at liberty to exercise the powers conferred by any acts of the *Inland Coast* or *Cambrian* Companies for raising money by mortgage to the extent of the money which remains unraised under the same acts respectively, and all the mortgages granted shall comprise and be charges on all the railways, undertakings, and property of the company, whether *Inland Coast* or general, and shall bear the interest in the mortgages respectively mentioned; and, as to priority, rank *pari passu* amongst themselves and equally with the mortgages comprised in Class A. in the schedule."

*Article 7.* "The company shall forthwith complete all contracts with landowners uncompleted, and settle all other debts and liabilities owing from the company, other than those comprised in the schedule, by granting to the landowners and creditors for the amount of the capital, purchase-moneys, and sums owing to them, together with their interest and costs respectively, if any, rent-charges, mortgages, or debenture stock in Class A. of this scheme, and to be subject to the provisions of Article 5 of this scheme, and all actions or suits brought or instituted by any such landowners or creditors against the company shall be stayed; and no actions or suits shall be brought or instituted against the company by any such landowners or creditors, except for non-performance of obligations under or within this scheme."

When this scheme was filed, actions brought against the company by simple contract creditors, suits and actions by unpaid vendors to recover purchase-money, and to enforce liens and suits in equity by debenture holders, were pending. Summonses having been issued to stay these proceedings, and adjourned into Court, Wood, V.-C., decided, as regarded actions by simple contract creditors and debenture holders, that those in which there was any question to be tried ought to be allowed to go on to trial, execution being stayed; and that in the others, to which the company admitted that they had no defence, proceedings ought to be stayed, on the company giving

judgment to be dealt with as the Court should direct. He refused to stay the proceedings by landowners, and as to these proceedings the company appealed. Lord Cairns, L. J., affirmed this judgment but on different grounds. After commenting on the divisions of the act, and the provisions of some of the different sections, his Lordship observed :—

“ I stated at the close of the case of the company that, although this was not the proper time for deciding what would be the effect of the scheme in the present case, I could not, for the purpose of the present application, read the act as giving it any force or validity, much less the force of an enactment, as against outside creditors—that is, general creditors—or against unpaid landowners. The persons against whom it is to have effect are those assenting to it or bound by it, that is, those who have actually agreed to it, or those who, not having agreed to it, are declared by the previous sections to be bound : in other words, the majority and the minority of the various classes whose votes are to be taken. If outside creditors or unpaid landowners were to be bound by the scheme, they must be bound by it, even though it postponed or gave them a dividend only on their debts, and they would be in a much worse position than shareholders or debenture holders, for no opportunity is given, or provision made, for their assenting to or dissenting from the scheme.”

After further commenting on the statute, and expressing his opinion, differing from that of the Vice-Chancellor, that the words “hereinbefore contained,” in sect. 23, related only to the earlier part of that section, and not to the previous sections ; and therefore that, in a proper case, the Court had jurisdiction to restrain proceedings by an unpaid vendor of land under sect. 7, and that an unpaid vendor would be obliged, under sect. 9, to obtain leave of the Court before issuing process, Lord Cairns proceeded :—

“ The question, however, remains—Is this a proper case for staying such proceedings ? I am clearly of opinion it is not. Without professing to lay down any rule which is to meet every case, I cannot think it would be right that the Court should suspend the proceedings of any unpaid landowner, or, indeed, of any outside creditor, unless it saw that a scheme was proposed in good faith, which, if it reached maturity, would afford a reasonable prospect of providing for the payment of the claims of creditors, and thus compensate them for a temporary suspension of their remedies. These clauses ” [Articles 5 and 7 of the scheme] “ hardly require comment, and, indeed, were scarcely attempted to be justified by argument. They provide in substance, not that the landowner shall be paid, but that he shall not be paid, that he shall lose his right of suit and action, and that in lieu of his debt he shall receive an obligation of the company, for the payment of which no provision is made, and which as to priority is to rank *pari passu* with similar obligations to be given for the claims of other landowners and creditors, and with the whole debenture debt in Schedule A. to the scheme. It appears to me to be impossible to suppose, holding, as I do, that the scheme, if matured, would not bind a landowner or outside creditor, that the Court would, during the maturing of the scheme, suspend the remedies of the landowner.”

*Railway Companies Act, 1907.*

debenture holders present or bound by majority.

outside creditors.

secretary.

debenture holders not allowed to vote.

in which court motion to be made.

This decision, where applicable, has been followed with approval in subsequent cases referred to in the note (u). The facts of these cases are too special for insertion. They establish that debenture holders are bound by the assents of their majority, unless it can be shown that those assents were obtained by fraud (x); that a debenture holder who obtains judgment is bound by the scheme, and will be restrained from taking proceedings under his judgment (y); and that an outside eligible creditor, although not bound by the scheme, cannot claim any benefit from it (z). A petition has been dismissed on the application of outside creditors (a). It has been held, too, that where a railway company had made no provision in their "scheme" for payment of the salary of their secretary, the secretary was entitled to a writ of *scil. fu.* against the shareholders, although he was aware of the scheme and had not objected to it (b).

The holders of debenture stock will not be allowed to vote like ordinary shareholders. Where a scheme provided that the holders of "debenture and preference stock should have the same privileges of voting, and the same rights and qualifications for directors and otherwise as the holders of ordinary stocks," Bacon, V.-C., referring to sect. 31 of the Companies Clauses Act, 1863, doubted whether the Court could make such an alteration in the constitution of the company as to admit creditors to vote, and approved the scheme with the omission of the words "debenture and" (c).

It was held, before the Judicature Act, that a motion for leave to issue execution ought to be made in the branch of the Court by which the scheme was sanctioned (d).

(u) *Re Potteries, &c. R. Co.*, L. R., 5 Ch. 67; *Potteries, &c. R. Co. v. Minor*, L. R., 6 Ch. 621; *Stevens v. Mid Hants R. Co.*, L. R., 8 Ch. 1061; 42 L. J., Ch. 694; 29 L. T. 318; *Re Bristol and North Somerset R. Co.*, L. R., 6 Eq. 119; *Stephens v. Cork and Kinsale R. Co.*, Ir. R., 6 Eq. 601.  
(x) *Re East and West Junction R. Co.*, L. R., 8 Eq. 87.  
(y) *Potteries R. Co. v. Minor*, ubi supra.

(z) *Stevens v. Mid Hants R. Co.*, ubi supra.  
(a) *Somerset and Dorset R. Co., In re*, 21 L. T. 656; 18 W. R. 332.  
(b) *Re Teign Valley R. Co.*, 17 W. R. 817.  
(c) *Re Stafford and Uttoxeter R. Co.*, 11 L. J., Ch. 777; 20 W. R. 921.  
(d) *Christ Church (Dean and Chapter of) v. West Junction R. Co.*, 17 W. R. 819.

## CHAPTER XVI.

## THE RIGHTS AND LIABILITIES OF RAILWAY COMPANIES AS CARRIERS.

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1. *The Power of Railway Companies to engage in and to relinquish the business of Carriers.*

1. *Power and Obligations to carry.*

A RAILWAY company, as we have seen,<sup>\*</sup> has by law no monopoly of carriage, but is required to permit any other company or person to run a train upon the railway on payment of toll. The powers of the companies to act as carriers themselves are derived from the 86th section of the Railways Clauses Act, 1845, which enacts, that "it shall be lawful for the company to use engines and carriages to be drawn thereby, and to carry upon the railway all such passengers and goods as shall be offered to them for that purpose." And the 89th section of the same act enacts as follows :—

\* Page 410.

R. C. Act, s. 86.  
Power to carry passengers and goods.

"Nothing in this or the special act contained shall extend to charge or make liable the company further or in any other case than where according to the laws of the realm, stage coach proprietors and common carriers would be liable, nor shall extend in any degree to deprive the company of any protection or privilege which common carriers or stage coach proprietors may be entitled to ; but, on the contrary, the company shall at all times be entitled to the benefit of every such protection or privilege."

sect. 89.  
Liabilities of company not to exceed those of common carriers.

Railway companies are common carriers ; but that the 86th section is permissive, and that the companies may relinquish the carrying



1. *Power and  
Obligation to  
Carry.*

Company may  
relinquish carry-  
ing business.

*Johnson v. Mid-  
land R. Co.*

business, must be taken to be clearly settled by *Johnson v. Midland R. Co. (a)*. In that case there was a canal from Syston to Melton Mowbray, and another canal from Melton Mowbray to Oakham. The defendants, by an extension act empowering them to make a branch line from Syston to Peterborough, had purchased the canal from Melton Mowbray to Oakham, and closed it entirely. After the opening of the branch line, which passed through Melton Mowbray and Oakham, and had stations at each of those towns, the defendants carried coals and goods the whole distance from Syston to Peterborough, and they carried oil-cake and other goods from Melton Mowbray to Oakham, but they never carried coals from Melton Mowbray to Oakham, nor could they do so unless they gave up the passenger traffic or made a new line of rail. The plaintiff took five tons of coal to the Melton Mowbray station yard, and there left them for conveyance to Oakham, tendering the price of carriage. The action was brought for refusal to carry. But the Court of Exchequer was unanimous that the company was "under no legal obligation to carry coals."

Parke, B., observed,—

"There has never been any doubt about the liability of a carrier to carry according to the profession which he makes to the public. A person, however, may take upon himself the business of a carrier and profess to carry light goods only, and then you cannot compel him to carry heavy goods; or he may choose to say that he will carry from Manchester to London, and not from the intermediate stations, and then you cannot make him take up goods from the latter. Still, as soon as he has publicly professed to carry in any particular manner, and so long as he does so, he is bound to carry the goods of any one, if he has room in his conveyance, and the price of the carriage be tendered when the goods are offered. Here, however, there has been no public profession on the part of the company, that they will carry coals from Melton Mowbray to Oakham. Nor, indeed, would the action lie in this case, even if there were such an implied contract with the public, because it does not appear that the company had conveniences for carrying coal from Melton Mowbray to Oakham. As to the proposition, that the liability arises from the statutes under which the defendants are empowered to act, and that, when they once become carriers, they are bound to carry all kinds of goods from and to every station on the line, it appears to me that that proposition is not made out. There might have been great ground for that proposition, if the acts had contained a prohibition to all other persons carrying on a like business on the line. But, on the contrary, the acts show that the public have a right to carry goods on a railway if they please. Practically, no doubt, that right has been found to be useless (b). We must, however, look, not to the practical effect, but to the meaning of the Legislature: and I am of opinion, that, under this act, if the company become carriers, there is no obligation on them to take upon themselves the duties of carriers

(a) 4 Exch. 367; 13 L. J., Ex. 386. See also *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749; *Carpue v. London and Brighton R. Co.*, 5 Q. B. 747; *Crouch v.*

*L. & N. W. R. Co.*, 23 L. J., C. P. 73.

(b) See *Powell, Duffryn, & Co. Co. v. Taff Vale R. Co.*, L. R., 9 Ch. 381, and p. 442, ante.

altogether, and on every part of their line, but they may confine their carrying to any part to which they choose to limit themselves, and they may afterwards relinquish the business if they please, though it is not necessary to determine that point now. I am of opinion that the 86th section of the Railways Clauses Act enables, but does not compel, the company to act as carriers."

Again, in *Hare v. L. and N. W. R. Co. (c)*, Wood, V.-C., said,—

Railway companies may relinquish carrying business.

"I cannot have any doubt; I felt none before in *Leicester and Carlisle R. Co. v. N. W. R. Co. (d)*, that there is a power in any railway company to abstain from carrying at all, if it thinks fit. I quite agree, if it becomes a carrier, it must then carry for all; it cannot carry for some and refuse to carry for others; but I am quite at a loss to discover any indication of intention in any of the acts that they should necessarily become carriers, except for the conveyance of the mails and troops, which it was thought Parliament was justified in imposing upon them. There are two indications very plain to the contrary: first, which is of course the highest indication, it is a power which is conferred, and not a direction or mandate on the part of the Government, that they shall be carriers on the line; secondly, in what is called the Cheap Passenger Traffic Act (7 & 8 Vict. c. 85), and through all those series of acts which provide for cheap trains, the provision is always that so long as they shall carry on the railway they shall have those cheap trains, indicating that it was probable or possible that they might themselves not become carriers. I say 'probable' for this reason: I do not know whether any such arrangement actually exists, but I can easily conceive the proprietors of short lines of railway joining to other large lines making arrangements that they should not become carriers at all, by which the carrying should take place totally by those larger companies; the officers of the short lines not of course contravening the intention of the Legislature by resigning the management of their line, but simply taking tolls under any such arrangement as they may think fit; and accordingly, whether with foresight or not, Parliament did contemplate that there might be other companies starting for using these lines, because in the Railways Clauses Act there is a clause (sect. 92), that the railway shall be free on the payment of tolls: and it was in contemplation, probably, that other companies or persons might be induced, although the difficulties which are incident to the thing have prevented such a course being taken, to become carriers upon the general line of railway."

Neither of these decisions, however, nor the 89th section of the Railways Clauses Act, can be taken to affect the general jurisdiction of the Railway and Canal Commission,\* nor the particular obligations, if any, imposed by the special Act.

\* See p. 165, ante.

The common law obligations of railway companies as carriers appear to be co-extensive with those of carriers not owning the road. All the decisions, therefore, upon the law of carriers are applicable and have been applied to railway companies, except where the law has been expressly modified by Act of Parliament. These decisions clearly establish that railway companies are bound to carry according to their profession, but not otherwise, all persons, animals and goods

General statement of obligations of railway companies as carriers.

(c) 30 L. J., Ch. 817; 2 J. & H. 80.

(d) 2 K. & J. 293; 25 L. J., Ch. 223.

1. *Power and  
Obligation to  
Carry.*

offered to them for carriage; that they carry passengers' luggage, animals and goods, as insurers; and that they carry passengers, not as insurers, but under the liability to answer to the passenger for any injury caused by their negligence to which he himself has not contributed. It is clear, also, that the companies may refuse to carry if their trains be full, and that they are liable for losses happening beyond their own line.

The Carriers Act is of general application, and modifies the liability of railway companies as insurers of goods. It would seem clear that the companies may, by any amount, exceed their maximum tolls with respect to the carriage of articles within the Carriers Act. The 7th section of the Railway and Canal Traffic Act, 1854, is of special application to railway and canal companies, and increases the liability of the companies as carriers of goods, passengers' luggage, and animals. This section gives the companies power to exceed their maximum tolls by a reasonable amount, with respect to certain animals therein mentioned (e). Lord Campbell's Act is of universal application, and increases the liability of railway companies for negligence of whatever kind, by allowing the representatives of the party killed by such negligence to sue the wrongdoer.

Rates and  
charges.

\* Page 447, ante.  
† Page 466, ante.  
‡ Page 462, ante.

§ Page 460, post.  
|| Page 581, post.

The obligations of railway companies to charge within a certain maximum varying with each special Act,\* to charge equally,† and to publish their charges,‡ have been already considered. A particular obligation to charge a reasonable sum only in respect of "terminal services," i.e., services springing out of but distinct from carriage,§ and a particular exemption from liability to carry dangerous goods,|| will be considered presently.

We will now pass to the more detailed discussion of the subjects of this chapter.

2. *Carriage of  
Goods and  
Animals.*

Liabilities of  
companies at  
common law.

\* Page 540, post.

## 2. *Of the Carriage of Goods and Animals.*

At common law, railway companies stand in the situation of insurer of all goods and animals entrusted to them, and are answerable for every loss or damage happening thereto by any external cause, except by the act of God\* or enemies of the sovereign (f). The companies, therefore, are responsible for loss by robbery as well as for the wrongful acts of mere strangers, in regard to the property bailed to them for transportation, and notwithstanding they are not themselves,

(e) As to goods, see per Cockburn, C. J., in *Pick v. North Staffordshire R. Co.*, 10 H. L. Cas. 473, and p. 585, post.

(f) *Forreard v. Pittard*, 1 T. R. 27. As to the rights of the railway company

against an insurance company upon a floating policy when station and warehouses burnt down and goods consumed, see *L. & N. W. R. Co. v. Glynn*, 1 Ell. & Ell. 652.

or by their servants, guilty of any negligence or omission of duty; and they have their remedy over against the wrongdoer for the damages they may sustain by his wrongful act (*g*). And upon the principle above mentioned, the companies are liable for a loss by accidental fire, while the goods are in their custody (*h*), or by the felony of their servants (*i*). This was the rule of the common law, which regulated all cases in which there was no special contract between carriers and their employers (*k*).

Liability in case of fire.

Another and equally important rule is, that the companies are bound to carry goods according to their profession (*l*).

Obligation to carry.

But the cases show that if a carrier refuses to take charge of goods, because his coach is full (*m*), or because the goods are of a nature which will at the time expose them to extraordinary danger (*n*), or to a popular rage (*o*); or because they are brought at an unreasonable time (*p*); these will furnish reasonable grounds for his refusal, and will, if true, be a sufficient legal defence to an action for the non-carriage of the goods (*q*).

The liability of insurers and the obligation to carry are the two essential features of "common carriers."

"Common carriers."

Another duty of carriers is to take the utmost care of goods from the moment of receiving them (*r*); to carry them safely to the proper place of destination; and to make a right delivery of them there, according to the usage of trade, or the course of business (*s*).

Carriers bound to carry safely.

A carrier is also required to obey the directions of the owner of the goods during their transit, and at any period of the transit he may have them back, unless the subsequent directions are unreasonable, as where goods have been put into a place from which they could not be removed without the greatest inconvenience or the like (*t*).

Stoppage in transitu

(*g*) *Trent and Mersey, &c. Co. v. Wood*, 4 Doug. 287; *Barlay v. y-Gaau*, 3 Doug. 389.

(*h*) *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 389; *Gatchell v. Bourne*, 4 Bing. N. C. 514; 7 Man. & G. 850; 11 Cl. & Fin. 46. For exception where goods warehoused, see *Chapman v. L. & N. W. R. Co.*, L. R., 5 Q. B. D. 278, and p. 519, post.

(*i*) *G. W. R. Co. v. Rimmell*, 18 C. D. 575, explaining *Hutt v. G. W. R. Co.*, 11 C. B. 140.

(*k*) As to special contracts, see *Wylid v. Pickford*, 8 M. & W. 443.

(*l*) *Johnson v. Midland R. Co.*, 4 Ex. 367, and p. 544, ante.

(*m*) *Lowitt v. Hobbs*, 2 Show. 127. In *Ex parte Robins*, 7 Dowl. 566, a mandamus was refused to compel a railway company to carry the goods of a particular carrier, on the ground that the general law of the land might be enforced by action.

(*n*) See sect. 5, post.

(*o*) *Edwards v. Sherratt*, 1 East, 604.

(*p*) *Lane v. Cotton*, 1 Id. Raym. at p. 652.

(*q*) Story on Bailments, sect. 508. Where a railway company agreed with a carrier that he should carry all goods presented to him at a certain specified rate of payment, and that the agreement should continue in force for twelve months, it was held that no action would lie, although the company ceased to present goods for carriage within the twelve months. *Burton v. R. N. R. Co.*, 9 Exch. 507; 23 L. J., Ex. 181.

(*r*) It is sufficient to prove a delivery either to an agent of the carrier, at the usual place of receipt, or to an agent who had authority to receive them. See *Burwell v. North*, 2 Car. & Kir. 680, per Erle, J.

(*s*) *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 389.

(*t*) Thus, where a package was directed to a passenger, per "Ship Melbourne,

2. *Carriage of Goods and Animals.*

Delivery to consignee at place other than that for which goods addressed.

But it has been held that, notwithstanding the contract with the consignor, the carrier may deliver the goods wherever he and the consignee may agree (u). Thus, where whiskey on which customs duties had not been paid was addressed to consignees at a custom-house, and claimed by and delivered to them at the railway station, whereby they escaped the payment of duties, it was held by the House of Lords that the consignors could not recover from the railway company the amount of the duties which the consignors had been compelled to pay in consequence of the default of the consignees (x).

Constructive delivery at siding.

In a case in Ireland, where the consignee of coals being advised of their arrival, neglected to send for them according to the usual practice, it was held that the carrying company performed their contract by a constructive delivery at a siding, where the coals were lost (y).

Carrier may set up title of real owner.

Common carriers, who are bound to receive goods and can make no inquiry as to the ownership, are not estopped from setting up the title of the *real owner* and delivering them to him; and as they would be protected by the law against *him*, if they delivered the goods in pursuance of their employment without notice of his claim; so they are equally protected against a *pseudo* owner from whom they receive the goods, in the event of the real owner claiming them, and their being given up to him (z).

Neglect of consignee to receive.

If the consignee refuse to receive the goods, the carrier is not bound to give notice to the consignor. He becomes an involuntary bailee only, but must do what is reasonable under the circumstances, what is reasonable being a question for a jury (a).

Horse, livery charges for.

A horse may be put into a livery stable if no person come to fetch him from the station, and the railway company may recover the livery charges from the consignee (b). How long a railway company would

Australia," and was sent by the plaintiff to the station of the defendants, to be taken to London, and it appeared that before the goods arrived in London the plaintiff delivered to a clerk, at the Euston station of the L & N. W. R., a written order, directing that they should be forwarded to Ratcliffe Highway, but the order was not complied with, and the goods were taken to the Melbourne and carried to Australia and lost, it was decided that the clerk at the Euston station was an agent of the defendants, having authority to receive the countermand, and that the defendants were liable for the loss occasioned by their non-compliance with the countermand. *Notthorn v. South Staffordshire R. Co.*, 22 L. J., Ex. 121; 8 Excl. 311.

(u) *L. & N. W. R. Co. v. Bartlett*, 31 L. J., Ex. 92; 7 H. & N. 100.

(x) *Cork Distillers Co. v. Grant*

*Southern and Western R. Co. (Ireland)*, L. R., 7 H. L. 269.

(y) *Bradshaw v. Irish North Western R. Co.*, 7 Ir. C. L. 252.

(z) *Sheldon v. New Quay Co.*, 28 L. J., C. P. 58. See also *European, &c. Mail Co. v. Royal Mail Steam Packet Co.*, 30 L. J., C. P. 247. In *Coombs v. Bristol and Exeter R. Co.*, 27 L. J., Ex. 269, a plea by carriers that they had received the goods from A. and had settled with him for the loss of them, was held bad.

(a) *Hudson v. Barendale*, 27 L. J., Ex. 93. See also *Crouch v. G. W. R. Co.*, 26 L. J., Ex. 418; *Heugh v. L. & N. W. R. Co.*, L. R., 5 Ex. 51; 39 L. J., Ex. 48; 21 L. T. 676.

(b) *G. N. R. Co. v. Swaffield*, L. R., 9 Ex. 132; 48 L. J., Ex. 89; 30 L. T. 562.

be bound to keep unclaimed goods, it is hard to say. But if they hold the goods in consideration of a warehouse rent, they are liable for negligence, although they may have advised the consignee that they hold them at "owner's sole risk" (c). Warehouse.

When a reasonable time has elapsed after the arrival of the goods, the liability of the company as insurers ceases, and they become liable as warehousemen only. This is settled by *Chapman v. Great Western R. Co.* (d). In that case the plaintiff was consignee of goods "to be left till called for," at Wimborne station. They arrived at the station and were warehoused there on the 24th day of the month. On the morning of the 27th they were burnt. The plaintiff expected them, and had called on the 22nd. The Court, while pointing out that in ordinary cases what was a reasonable time within to call was a question of fact, decided that a reasonable time had elapsed, and that the defendants were not liable, as there was no evidence of negligence. Cesser of liability of insurers.  
*Chapman v. G. W. R. Co.*

The ordinary advice-note sent by a railway company to a consignee does not estop the company from afterwards setting up that all the goods described therein were not in fact delivered to the company by the consignor (e). The company will not be liable for a mis-delivery upon an advice-note or voucher fraudulently obtained from the consignee (f), nor, if they follow the usual course of business, for a conversion of goods entrusted to them in pursuance of a fictitious order, and delivered to a wrong-doer in fraud of the real owner (g). Advice-note.

To the question, at what time the carrier is bound to make a delivery of the goods, the general answer is, that he is bound to deliver the goods within a reasonable time (h), under ordinary circumstances, but he is not bound to use extraordinary efforts, or incur extraordinary expense in order to surmount obstructions caused by the act of God. And the act of God, according to the decision of the Court of Appeal in *Nugent v. Smith* (i), appears to be a direct, violent, sudden, and irresistible act of nature which could not by any reasonable care have been foreseen or resisted (k). A carrier's first duty is to carry safely, and he is justified in incurring delay where necessary to secure that (l). If, however, the party sending the Time of delivery.

(c) *Mitchell v. Lancashire and Yorkshire R. Co.*, L. R., 10 Q. B. 256.

(d) L. R., 5 Q. B. D. 278; 19 L. J., Q. B. 420; 12 L. T. 452; 28 W. R. 566.

(e) *Carr v. L. & N. W. R. Co.*, L. R., 10 C. P. 307; 31 L. T. 786.

(f) *Hugh v. L. & N. W. R. Co.*, *ubi supra*.

(g) *M'Kean v. M'Leur*, L. R., 6 Ex. 36, 40 L. J., Ex. 30; 24 L. T. 559.

(h) *Raphael v. Piddford*, 5 Man. & G. 551; 2 Dowl. N. S. 416; *Hals v. L. &*

*N. W. R. Co.*, 32 L. J., Q. B. 202. What constitutes delivery is a question of fact. See *Shapham v. Bristol and Exeter R. Co.*, 37 L. J., Ex. 113.

(i) L. R., 1 C. P. Div. 123; 45 L. J., C. P. 697; 34 L. T. 827.

(k) In *Heidson v. G. N. R. Co.*, 25 L. J., Ex. 51; 32 L. T., O. S. 94, a snow-storm was held the act of God.

(l) *G. N. R. Co. v. Taylor*, 35 L. J., Q. P. 210; Har. & Ruth. 471.

Act of God.  
*Nugent v. Smith.*

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goods stipulate that the carrier shall forward them the same evening, a special contract is created, and the carrier may be sued for a breach of it (*m*). The deposit of coals at a siding has been held to operate as a constructive delivery (*n*).

Goods within  
Carriers Act.

If goods be within the Carriers Act, that Act may be set up as a defence to an action for not delivering them within a reasonable time (*o*).

Reasonable  
route.

A railway company does not appear to be bound to carry by its shortest route (*p*).

Price of carriage.

A carrier is, in all cases, entitled at common law to demand the price or hire of carriage, before he receives the goods; and, if it is not paid, he may refuse to take charge of them. But it is not necessary in order to support an action for refusing to carry, that the satisfaction should have been tendered, in the strict sense of that term, as applied to antecedent debts. It is sufficient, if the consignor was ready and willing to deal for ready money, and notifies that readiness and willingness to the carrier; the money is not required to be paid down until the carrier receives the goods which he is bound to carry (*q*). If the price of carriage is not paid before the goods are received, the carrier cannot sue for such price till they are delivered (*r*).

*Hadley v. Baxendale*.  
Damages for  
non-delivery.

With regard to the damages to which a carrier is liable for non-delivery of goods, the following rule was laid down in *Hadley v. Baxendale* (*s*):—

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally and in the great multitude of cases, not affected by any special circumstances, from such a

(*m*) See *Pickford v. Grand Junction R. Co.*, 12 M. & W. 766, where the defendants were sued for not forwarding pork on the evening of delivery.

(*n*) *Broadshaw v. Irish North Western R. Co.*, Ir. R., 7 C. L. 252; 21 W. R. 581.

(*o*) *Wallace v. Dublin and Belfast*

*Junction R. Co.*, Ir. R., 8 C. L. 341.

(*p*) *Myers v. L. & S. W. R. Co.*, L. R., 5 C. P. 1, and p. 449, ante.

(*q*) *Pickford v. Grand Junction R. Co.*, 8 M. & W. 372; 2 Railw. Cas. 592.

(*r*) *Barnes v. Marshall*, 18 Q. B. 785.

(*s*) 9 Exch. 341.

breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

Upon this principle, where a miller sent a broken iron shaft to a carrier to be conveyed by him to a consignee as a pattern for a new shaft, and the carrier's clerk was told that the mill was stopped, and the shaft must be delivered immediately, and that a special entry, if necessary, must be made to hasten its delivery; but the delivery was nevertheless delayed an unreasonable time, in consequence of which the mill was stopped, and the miller incurred a loss of profits; it was held that such loss could not be recovered against the carrier, who had no notice that the profits of the mill would be stopped by unreasonable delay in delivering the shaft, and the loss could not be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both parties when they made the contract (*t*). Loss of profit.

The rule of *Hadley v. Baxendale*, although more than once questioned (*u*), has been frequently followed (*x*), and although not capable of meeting all cases (*y*), has never been departed from in England and the rule obtaining in America is substantially identical therewith (*z*).

Where a railway company refused to carry at the ordinary rate packed parcels for a carrier, whereby he was obliged to send them by a more circuitous route at a greater expence, it was held that he was not entitled to recover damages for an alleged loss of business (*a*). *Crouch v. Great Northern R. Co.*  
Loss of business

So in an action for delay in delivering skins for making gloves, Keating, J., held that the plaintiff, although entitled to recover the deterioration in the value of the skins, could not recover the loss in wages paid to workmen kept idle in consequence of their non-arrival, and his ruling was upheld by the Court of Queen's Bench (*b*). *Le Printur v. South Eastern R. Co.*  
Loss in wages

In *Gee v. Lancashire and Yorkshire R. Co.*, the plaintiffs caused to be delivered bales of cotton to a railway company to be carried *(The v. Lancashire and Yorkshire R. Co.)*  
Loss of profit and wages.

(*t*) *Hadley v. Baxendale*, 9 Exch. 311.

(*u*) See per Crompton, J., in *Statons v. Patchett*, 28 L. J., Q. B. at p. 197; per Blackburn, J., in *Horn v. Mullan R. Co.*, 42 L. J., C. P. at p. 61.

(*x*) See *Portman v. Middleton*, 27 L. J., C. P. 231; *Smeed v. Ford*, 28 L. J., Q. B. 178; 1 E. & E. 602; *Hales v. L. & N. W. R. Co.*, 32 L. J., Q. B. 292; *O'Hanlon v. G. W. R. Co.*, 34 L. J., Q. B. 154; 6 B. & S. 484; *Woodger v. G. W. R. Co.*, 36 L. J., C. P. 177.

(*y*) See *Hamd v. Fild*, 11 Ir. C. L. R. 43; *Pitson v. Newport Dock Co.*, 35 L. J., Ex. 97; 1 H. & C. 232; *Cory v. Thomas Ironworks, &c. Co.*, 37 L. J., Q. B. 68.

(*z*) See all the cases in both countries collected and discussed in Sedgwick on Damages, 6th ed., A.D. 1874, p. 61.

(*a*) *Crouch v. G. N. R. Co.*, 11 Exch. 742.

(*b*) *Le Printur v. S. E. R. Co.*, 2 L. T. 170.



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from Liverpool to Oldham, and instead of being delivered the following morning, which was the usual time, the cotton was not delivered for four days. The plaintiffs inquired for it at the Oldham station, both before and after the actual delivery of it to the defendants, and told the defendants' manager that the plaintiffs' mill was at a standstill on account of the non-delivery of the cotton, and that they would look to the company for compensation for the loss sustained; but the fact of the mill being at a standstill was not communicated to the defendants or their agents at Liverpool at the time the cotton was delivered to them to be carried; and in consequence of the delay a new mill of the plaintiffs was prevented working for two days and a half, and workpeople kept idle to whom plaintiffs had to pay 7*l.* wages, and the plaintiffs claimed 7*l.* 10*s.* for the profits they would have made by working their mill for the time in question: it was held by the Court of Exchequer that neither wages nor loss of profit could be recovered (c).

*Wilson v. Lancashire and Yorkshire R. Co.*  
Deterioration of  
goods, loss of  
season.

It has, however, been held in an action by a cap manufacturer against a railway company for damages for loss sustained by delay in delivery of cloth, by which the plaintiff lost the season for making it into caps, and so disposing of it, that although the plaintiff could not recover his loss of profits, yet the jury might take into consideration the deterioration in the marketable value of the cloth, by reason of the season having passed for making caps which the plaintiff might then have sold (d); and the principle of this case has recently been applied to the case of samples of wool delayed until the season at which they could be used for procuring orders had elapsed, similar samples not being procurable in the market (e), so that the plaintiffs were held entitled to recover as damages the value to them of the samples at the time at which they should have been delivered.

samples

Loss of sale  
at show.

Damages are recoverable for the loss of a sale at a show (f), though not for the loss of a chance of a prize at a show (g), and where a parcel was left at a receiving office labelled "Stand 23, Show Ground," it was held that the label was sufficient notice that the goods were being sent to a show so as to admit of damages being recoverable for the parcel being delivered too late for the show (h).

*Collard v. South  
Eastern R. Co.*  
Deterioration—  
Market value—  
Hops.

In *Collard v. South Eastern R. Co.* (i), the plaintiff sent hops in bags from Kent to London by the defendants' railway, for the pur-

(c) *He v. Lancashire and Yorkshire R. Co.*, 30 L. J., Ex. 11; 6 H. & N. 211.

(d) *Wilson v. Lancashire and Yorkshire R. Co.*, 30 L. J., C. P. 232; 9 C. L., N. S. 632.

(e) *Schultz v. G. E. R. Co.*, L. R., 19 Q. B. D. 30; 56 L. J., Q. B. 442; 57 L. T. 438; 35 W. R. 633—C. A.

(f) *Simpson v. L. & N. W. R. Co.*, 45

L. J., Q. B. 152.

(g) *Wilson v. Ambergate R. Co.*, 19 Jan. 115.

(h) *Junerson v. Midland R. Co.*, 50 L. T. 426.

(i) 30 L. J., Ex. 393; 7 H. & N. 79. As to damage arising from bad packing, see *Higginbotham v. G. N. Co.*, 2 Fost. & F. 796.

pose of delivery to the vendee, a hop-dealer. The hops were detained by the defendants several days, and were damaged by water, and the vendee refused to accept them. The plaintiff dried the hops, but when fit for sale the price had fallen; moreover, the stained part of the hops deteriorated the market value of the whole, although for browing purposes the bulk was unaffected. The plaintiff sued the company, and it was held that he was entitled to recover the difference between the market value (*k*) of the whole on the day the hops ought to have been brought to market, and the day on which they were afterwards brought to market, and was not confined to the value of the parts actually damaged, although the defendants had no notice that the hops were sent for sale and not for use; and it was also held that there was no difference between a delay occasioned by the detention of the hops in the hands of the carrier, and the delay necessary for restoring them to a marketable state when delivered by the carrier in a damaged condition.

Where rags were delivered 14 days late in a worthless state from their having been packed in a damp state, it was held that only nominal damages were recoverable, because the rags would not have been injured if they had been packed dry, and the loss was attributable to the plaintiff's own act in packing them wet without informing the company that special care was necessary (*l*).

Damages to cargo by being packed wet

A contract to carry by a particular train does not amount to a warranty that such train shall start or arrive at the time mentioned in the time bills (*m*).

Contract for particular train

There seems little doubt that a railway company may decline to carry at extra speed except at an extra rate (*n*). Whether a company may decline to carry at an extraordinary risk arising out of the breach of the ordinary contract to deliver within a reasonable time is another and more difficult question, which was raised but not decided in *Horne v. Midland R. Co.* (*o*). There the majority of the Exchequer Chamber held, on a special case, that the plaintiff was not entitled to recover for the non-delivery, on a particular day, of a quantity of shoes which the plaintiff had contracted to deliver (for the supply of the French army during war) on or before that particular day. The

Extra rate for extra speed.

Non-delivery of shoes.  
*Horne v. Midland R. Co.*

(*k*) *In Rio v. French*, 30 L. J., Ex. 471; 7 H. & N. 90, the consignee was held entitled to recover the value of goods at the place to which they were consigned, as distinguished from the place at which they were delivered to the carrier. See *O'Hanlon v. G. W. R. Co.*, 31 L. J., Q. B. 151; 6 B. & S. 184; *Williams v. Reynolds*, 34 L. J., Q. B. 221; 6 B. & S. 495; *G. W. R. Co. v. Redman*, L. R., 1 Q. P. 329; *Woodger v. G. W. R. Co.*, 36 L. J., C. P. 177.

(*l*) *Baldwin v. L. C. & D. R. Co.*, L. R.,

9 Q. B. D. 582.

(*m*) *Lord v. Midland R. Co.*, L. R., 2 C. P. 339; 36 L. J., C. P. 170.

(*n*) See per Lush, J., in *Horne v. Midland R. Co.*, *infra*. The special act usually contains a clause framed to meet such a case, and allowing the companies to exceed their maximum rate. See p. 458, *ante*.

(*o*) L. R., 8 C. P. 131; 42 L. J., C. P. 59; 23 L. T. 312; 21 W. R. 481, affirming (*dis*.) Lush, J., and Piggott, B.) *S. G. L. R.* 7 C. P. 583.

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plaintiff informed the station master at Kettering (whose authority was admitted) that the shoes would be thrown back upon his hands if not delivered in London to time, but did not otherwise disclose the nature of the contract. The shoes were in fact delivered a day late, and thrown back upon the plaintiff's hands, with the result that, owing to a fall in the market from a cessation of the war, he lost 1s. 3d. a pair on resale. The Court held that the defendants were not liable for this extraordinary loss, the ground of the decision being, that there was no clear notice that the breach of contract would be followed by any other loss than the market value. Kelly, C.B., appears to have thought that, in the absence of a special contract, and in the event of clear notice to the company, they would have been bound both to carry the goods at the ordinary rate and to bear the extraordinary loss; but Pigott, B., and Lush, J., appear to have thought otherwise.

Damage from  
delivery of  
wrong goods.

In the curious case of *Cunnington v. G. N. R. Co. (p)*, which was decided on demurrer, it appeared that Messrs. Crosse & Blackwell were in the habit of sending empty casks by the defendants' railway to the plaintiff, which the plaintiff, a manufacturer of ketchup, filled with ketchup and returned to Messrs. Crosse & Blackwell, that the defendants negligently delivered to the plaintiffs other casks, which had been filled with turpentine; and that the plaintiffs mistaking such other casks for those of Messrs. Crosse & Blackwell, filled them with ketchup, and spoilt the ketchup. The defendants were held not liable in respect of the ketchup so spoilt; on the ground, it seems, that they could not have expected that the casks would not have been examined before being filled.

Damage from  
incorrect advice  
notes.

In *Carr v. L. & N. W. R. Co. (q)*, the defendants were held not liable to a consignee who resold a greater quantity of bleaching powder than that consigned to him on the strength of an advice note describing such greater quantity as remaining at the station to his order; but in *Coventry v. Great Eastern R. Co. (r)*, the defendants were held liable to a third party who advanced money upon two delivery orders in favour of the borrower which represented, upon the strength of two advice notes, that the borrower was entitled to the delivery of two consignments of wheat, whereas he was in fact entitled to the delivery of one only.

Carriers have  
special property  
in goods.

As to the general rights of carriers, it is to be observed, that, in virtue of the delivery of the goods, they acquire a special property in them, and may maintain an action against any person who takes the goods out of their possession, or does any injury to them (s). This

(p) 49 L. T. 392—C. A.

(q) L. R., 10 C. P. 307.

(r) L. R., 11 Q. B. D. 776; 52 L. J.,

Q. B. 694; 49 L. T. 641—C. A.

(s) 2 Wms. Saund. ed. of 1871, p. 94.

right arises from their general interest in conveying the goods, and their responsibility for any loss or injury to them during their transit.

At common law a carrier has a lien on the particular goods carried (t), but it seems no general lien for a balance of account (u). The 97th section of the Railways Clauses Consolidation Act, which gives a general power to detain and sell all goods in case of non-payment of tolls due in respect of any, has been construed, in *Wallis v. L. & S. W. R. Co.* (x), as applicable to tolls due for the use of the railway only. If this decision be correct, the companies acting as carriers have only the common law lien to rely upon, and this carries with it no right to sell (y). It is, however, common for railway companies to create a general lien by agreement, such as by a condition in the consignment note that "all goods delivered to the company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or other charges," and also to stipulate for a right to sell in case the lien be not satisfied (z), and a lien so created is not affected by the refusal of the consignee to accept the goods (v), but must be satisfied by the consignor before he can recover the goods. A company, however, cannot claim the benefit of such an agreement where the receiver of a bankrupt consigns goods to him (b). A general lien will not enure to bind the owner, unless he be both consignor and consignee (c). And it has been expressly held that the general lien does not affect the consignor's right to stop *in transitu* (d).

Lien for unpaid freight.

No right to sell for unpaid freight.

Stoppage in transitu.

Where goods were carried at the lower of two rates, and the consignee was allowed the gratuitous use of a crane which was unsafe to the knowledge of the defendants, and broke, causing the death of the servant of the consignee, it was held that an action by the representatives of the servant was not maintainable (e).

Liability of company to consigner assisting in delivery.

It has been doubted (f) whether the liability of a railway company in respect of the carriage of animals is that of insurers, but the preponderance of authority is in favour of making no distinction in this respect between the carriage of animals and the carriage of goods.

The carriage of animals.

Company liable as insurers.

(t) *Slanger v. Upphar*, 2 Ld. Raym. 752. If the goods be delivered the lien is waived. Redfield on Railways, vol. II., p. 169, citing *Buggs v. Martin*, 13 B. Monroë, 289, 213.

(u) *Rushforth v. Hadfield*, 6 East, 519; 7 East, 221.

(x) *Wallis v. L. & S. W. R. Co.*, L. R., 5 Ex. 82, and p. 454, ante.

(y) See *Jones v. Penile*, 1 Strange, 550.

(z) See *Westfield v. G. W. R. Co.*, 32 L. J., Q. B. 276.

(v) *Westfield v. G. W. R. Co.*, supra, reversing the decision of the Judge of the High Wycombe County Court.

(b) See *G. W. R. Co., Ex parte, Bushell*, L. R., 22 Ch. D. 470; 52 L. J., Ch. 731.

(c) *Rushforth v. Hadfield*, 6 East, 519; 7 East, 221; *Wright v. Snell*, 5 B. & Ald. 350.

(d) *Oppenheim v. Russell*, 3 B. & P. 42.

(e) *Blackmore v. Bristol and Exeter R. Co.*, 27 L. J., Q. B. 167.

(f) See per Martin, B., in *Pardington v. South Wales R. Co.*, 1 H. & N. 392; 28 L. J., Ex. at p. 108; and per Pigott, B., in *Kendall v. L. & S. W. R. Co.*, 41 L. J., Ex. at p. 185.

2. *Carriage of  
Goods and  
Animals*—

Exception in  
case of "proper  
vice."

*Blower v. Great  
Western R. Co.*

That carriers, and railway companies acting as carriers, are insurers of goods has already been pointed out as well established. Both with regard to goods and animals, however, the implied contract of insurance is subject to the exception that where injury happens to the thing carried from the inherent nature of the thing itself, the liability of the carrier as insurer does not exist. The leading case on this branch of the subject is *Blower v. Great Western R. Co. (g)*. The facts were these:—Thirty-three head of cattle were delivered to the company for carriage from Dingeston to Northampton. They were loaded into four trucks in the usual and proper way, and the doors were properly secured. A bullock escaped from one of the trucks and was found lying dead upon the line. The death of the bullock was caused solely by its escape from the truck, and it had made its own escape, either by clambering over the top rail or by forcing its way between the iron bars of the truck. All actual negligence on the part of the company was negatived. Willes and Keating, JJ., held, that a judgment of a county court judge against the company ought to be reversed, and Willes, J., observed:—

"The bullock was received by the company under the terms of a notice which is assailed by the plaintiff. It is unnecessary to consider whether or not the notice was a reasonable one. The question for our decision is whether the defendants, upon the facts and findings of the county court judge, are liable as common carriers for the loss of this animal. Whether a railway company are common carriers of animals is a question upon which there has been much conflict of opinion; and although there may be difficulties in determining that question, such as induced Lord Wensleydale, in *Carr v. Lancashire and Yorkshire R. Co. (h)*, to make the observations which have elicited remarks from learned judges apparently to the contrary, it may turn out after all to be a mere controversy of words. The question as to their liability may turn on the distinction between accidents which happen by reason of some vice inherent in the animals themselves or disposition producing unruliness or frenzy, and accidents which are not the result of inherent vice or unruliness of the animals themselves. It comes to much the same thing whether we say that one who carries live animals is not liable in the one event but is liable in the other, or that is, he is not a common carrier at all, because there are some accidents other than those falling within the exception of the act of God and the Queen's enemies, for which he is not responsible. By the expression 'vice' I mean that sort of vice which, by its internal development, tends to the destruction or the injury of the animal or thing to be carried, and which is likely to lead to such a result. If such a cause of destruction exists and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties."

(g) L. R., 7 C. P. 655; 41 L. J., C. P. 268. The consignor had signed a special contract (as to which, see sect. 4, post),

but nothing turned upon the construction of it.

(h) 7 Exch. 707; 21 L. J., Ex. 261.

Shortly afterwards *Kenidall v. London and South Western R. Co.* (i) came before the Court of Exchequer. There a saddled horse was placed by the company's servants in a proper horsebox in the usual manner. The saddle was left on the horse, according to the usual custom in such cases, with the stirrups hanging down. At the journey's end the horse was found to be injured in the forearm and fetlock. The horse was proved to be free from vice, and nothing unusual occurred to the train during the journey. It was held by Martin and Bramwell, BB. (diss. Pigott, B.), that in the absence of further proof the company were not liable. In a considered judgment, Bramwell, B., observes:—

"There is no doubt in this case that the horse was the immediate cause of its own injuries; that is to say, no person got into the box and injured it. It slipped or fell, or kicked or plunged, or in some way hurt itself. If it did so from no other cause than its inherent propensities—its 'proper vice,'—that is to say, from fright or temper, or struggling to keep its legs, the defendants are not liable. But if it so hurt itself from the defendants' negligence, or from any misfortune happening to the train, though not through any negligence of the defendants, as, for instance, from the horsebox leaving the line owing to some obstruction maliciously put on it, then the defendants would as insurers be liable. If perishable articles, say soft fruit, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them, or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable, and the recently decided case of *Great Western R. Co. v. Blower* (ubi sup.) is to this effect."

In both of the above cases the animals were carried under a special contract, made in accordance with the 7th section of the Railway and Canal Traffic Act, 1854, but no question arose as to the reasonableness or construction of the contract. Other cases relating to the carriage of animals are treated of hereafter.

It seems that railway companies are not bound to carry animals, but may limit their business of carriers in this respect, and may refuse to carry animals except under special contract. This was assumed in *Richardson v. North Eastern R. Co.* (k), and expressly decided in *Dickson v. Great Northern R. Co.* (l), both of which cases, though arising out of the carriage of dogs, appear to apply to the carriage of animals generally. In *Richardson's case* the company had given public notice that they were not "common carriers of horses, cattle, sheep, pigs, and other animals," but would only undertake the carriage of animals under special contract. A greyhound, having on a leathern collar with a strap attached, was delivered to the

\* Page 563.

Companies not bound to carry animals.

(i) L. R., 7 Ex. 378; 41 L. J., Ex. 184.

(k) L. R., 7 Q. B. 80; S. C. nom. *North Eastern R. Co. v. Richardson*. 41 L. J.,

C. P. 80. And see *Johnson v. Midland*

*R. Co.*, 4 Exch. 387, and p. 544, ante.

(l) L. R., 18 Q. B. D. 176.

2. *Carriage of  
Goods and  
Animals.*

defendants for carriage, and the fare paid. In the course of the journey there was a change of trains, and the greyhound was fastened by the strap and collar to an iron spout on the open platform of a station. While so fastened, it slipped from the collar, and ran upon the line and was killed. It was held that the fastening of the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient (*m*), was no evidence of negligence on the part of the company. In *Dickson's case* the question was whether a particular condition of carriage was reasonable, and the Court of Appeal held that it was not (*n*), but distinctly laid down that though the company were bound to provide reasonable facilities for the carriage of dogs, they were not common carriers of them.

Defective  
horsebox.

But where a defective horsebox was provided by a railway company, and a groom in charge of a horse gave advice as to remedying the defect, which was followed by the defendants' servants, it was held that the company were liable for injuries to the horse arising from the defect (*o*). And where the owner of a heifer assisted, with the consent of a station master, to shunt the horsebox in which the heifer was, in order to hasten delivery, and while so doing was injured by the negligence of the defendants' servants, it was held that he could recover from the company (*p*).

Owner assisting  
delivery.

Drover travel-  
ling with free  
pass.

It is a frequent practice for companies to allow drovers of cattle to travel free on condition of making no claim upon the company for compensation in event of injury. It seems that such contracts are perfectly good in law, and if the drover be injured by the negligence of the company's servants, he is without redress. Thus, where a drover agreed to "travel at his own risk," and sued the company for negligence, whereupon the company pleaded the agreement, the replication of the drover that the injury happened "by reason of the gross and wilful negligence and mismanagement of the defendants," was successfully demurred to (*q*). Such an agreement, too, exempts

(*m*) *Stuart v. Crawley*, 2 Stark. 323, where the defendant was held liable for the loss of a dog, was distinguished on this ground, and also on the ground that the defendant was a common carrier in that case.

(*n*) See section 4 of this chapter.

(*o*) *Combe v. L. & S. W. R. Co.*, 31 L. T. 613.

(*p*) *Wright v. L. & N. W. R. Co.*, L. R., 10 Q. B. 298; 41 L. J., Q. B. 119; 32 L. T. 590.

(*q*) *McCawley v. Furness R. Co.*, L. R., 8 Q. B. 57; 42 L. J., Q. B. 4; 27 L. T. 485; 21 W. R. 140. It is pointed out by Blackburn, J., that it would be quite a different thing if an action were brought for an independent wrong, such as assault

or false imprisonment, and that the agreement would not take away any liability that might be incurred as to criminal proceedings. See also *Duff v. Great Northern (Ireland) R. Co.*, 4 L. R., Ir. C. L. 178, which is similar to *McCawley's case*, and *Johnson v. Great Southern and Western R. Co.*, Ir. R., 9 C. L. 108, in which a passenger taking a ticket containing a condition that, inasmuch as the holder was permitted to travel, as he did, by a passenger carriage attached to a goods train, the company should not be responsible for injury caused by the carriage being attached to the goods train, was held to be bound by the condition, although, in fact, unaware of its terms.

the company from liability not only during the actual transit on the railway, but while the drover is leaving the premises (*r*), and applies to the whole of a through journey (*s*).

The Contagious Diseases Animals Act, 1878, 41 & 42 Vict. c. 74, repealing and replacing with many amendments the Contagious Diseases Animals Act, 1869, 32 & 33 Vict. c. 70, contains many provisions expressly affecting railway companies. These provisions, which are subject to modifications by Privy Council orders from time to time, are set out at length in Volume II. The most important of them are contained in section 33, whereby every company must provide water and food, or either of them, on request of the consignor or person in charge, to the satisfaction of the Privy Council, at such stations as the Privy Council direct for animals [*i.e.*, by 55, cattle, sheep, and goats, and all other ruminating animals and swine] "carried or about to be or having been carried on the railway of the company." The penalty for disobeying this enactment appears from sub-sects. 60 and 61 (par. iii.) to be not more than 20*l*. (or not more than five pounds for each animal) if the offence be committed with respect to more than four animals. By sect. 33, the consignor or person in charge must request a supply of water in case of long journeys, and the company may make for water or food such reasonable charges as the Privy Council by order approve.

Restriction on carriage of animals by Contagious Diseases Animals Act.

Provision of water and food at stations.

By sect. 32 the Privy Council may make orders for prohibiting the movement of animals. Where an order was made under this section empowering local authorities to make regulations prohibiting such movement, and the local authority of Dorsetshire made such regulations, one of which was that animals should not be moved into their district without the owner having signed a certain declaration, it was held that a company which carried pigs on part (from Bristol to Templecombe in Somersetshire) of a through route from Cork to Gillingham in Dorsetshire, were amenable to such regulation, and therefore liable to a penalty for "causing, directing, or permitting" the movement of the pigs in Dorsetshire without the required declaration (*f*). In another case a company refused to carry animals without a declaration being made in pursuance of a similar regulation, and successfully defended an action for refusal to carry (*u*).

(*r*) *Gallin v. L. & N. W. R. Co.*, L. R., 12 Q. B. D. 629; 53 L. J., M. C. 79; 32 Q. B. 212; 44 L. J., Q. B. 89.  
 (*s*) *Hall v. North Eastern R. Co.*, L. R., 10 Q. B. 437; 44 L. J., Q. B. 164.  
 (*t*) *Midland R. Co. v. Freeman*, L. R., 12 Q. B. D. 629; 53 L. J., M. C. 79; 32 W. R. 830.  
 (*u*) *Williams v. G. W. R. Co.*, 52 L. T. 250.



### 3. Terminal Charges.

Each special act authorizes terminal charges.

Terminal charges are charges for loading and unloading, and other services of a like nature which railway companies perform for their customers when the work of carrying is over. "Terminals" are not mentioned in the Railways Clauses Acts, which authorize charges for carrying only. Each company derives its authority (if any) to make a terminal charge from its own special Act, and the nature of the charge is variously defined in these Acts (x). The course of special legislation upon the subject with references to the various special Acts is fully traced in the argument in the important case of *Hall v. London, Brighton, and South Coast R. Co.* (y), which will be presently referred to.

Where unauthorized by statute, terminal charges, in excess of the maximum tolls, are, in the absence of special agreement, irrecoverable (z). Nor need the amount of them be published on the toll-board prescribed by sub-sects. 93 and 95 of the Railways Clauses Act, 1845; they are not "tolls" within the meaning of those sections (a).

Distinguishment between terminals and tolls.

By the Regulation of Railways Act, 1868, within a week after payment of any charge in respect of conveyance of goods, the customer may apply to the secretary of the company, and the company must then, within fourteen days, render an account to the customer, distinguishing how much of the charge is for conveyance, and how much for terminals (b). And by the Regulation of Railways Act, 1873, the Railway and Canal Commission may, on the application of any party interested, make orders requiring a company to distinguish their rates in like manner in the rate-books which they are bound to keep at each of their stations. The Commissioners have also power to determine disputes as to terminal charges where such charges are not fixed by statute, and to decide finally what is a reasonable sum to be paid for "loading and un-

Jurisdiction of Railway Commissioners.

(x) By the short distance clause of the earlier special acts the companies were empowered to charge for traffic "conveyed a less distance than six miles, in addition to the tolls and charges, a reasonable charge for the expense of stopping, loading and unloading." From this it would seem that originally the maximum mileage rate for distances beyond six miles was intended to cover all services of loading, &c., and that the clause was put in to remunerate a company in cases where the distance was so short that the mere mileage rate would not cover expenses of this nature. But subsequent legislation modified this view, and a general charge

for services performed at the station, commonly called a "terminal charge," was gradually authorized in addition to the mileage rate. Report of Royal Commission 1867, p. xxxii.

(y) L. R., 15 Q. B. D. 505.

(z) *Pygh v. Monmouthshire R. Co.*, 30 L. J., Ex. 219.

(u) *Pygh v. Monmouthshire Canal and R. Co.*, L. R., 4 App. Cas. 197; 49 L. J., Ex. 180, in which case, the House of Lords being equally divided, the decision of a majority of the Court of Appeal was affirmed.

(b) 31 & 32 Vict. c. 119 s. 17.

loading, covering, collecting, delivery, and other services of a like nature" (c), but a charge for demurrage for goods delivered but not removed is not affected by a decision of the Railway Commissioners as to the reasonableness of it (d). The Commissioners have jurisdiction not only as to the amount of a charge for an admitted terminal service, but as to the question whether a service alleged to be terminal ought or not to be included in the mileage rate (e). Rate-books must be kept at mineral sidings, as well as stations in the ordinary sense of the term (f), and through rates must be shown (g), but only at the station of departure (h), and the manner in which they are divided amongst the companies receiving them need not be shown (i). It is no answer to an application for an order to distinguish that the rates are mileage rates within the parliamentary powers, and are not made up of separate sums, as it does not follow that the whole of each rate is for conveyance only, and that part is not for other expenses (k). The order to distinguish will be confined to rates charged at the time of the application (l), but the withdrawal of rates after application will not disentitle the applicant to an order at the hearing (m). It is not a compliance with an order to distinguish, as pointed at by sect. 14, to "specify the nature and detail" of expenses other than those of conveyance, to give a list of services performed and to state the total charged for all of them: what is required is a statement of what terminal services are undertaken with respect to the particular traffic of the applicant, and of how much is charged for each such service (n), in order that it may be seen under sect. 15 whether an expense charged for is correctly charged, and whether the amount charged is reasonable (o).

The modern "maximum rate clause" usually provides for terminals as follows:—

Common form clause as to terminals.

"The maximum rate of charge to be made by the company for the conveyance of animals and goods . . . on the railway, including the tolls for the use of the railway, and for waggons or trucks and locomotive power, and for every other expense incidental to such conveyance (except a reasonable charge for loading and unloading goods at any terminal station in respect of such goods, and for delivery and collection, and any other service incidental to the business

(c) 36 & 37 Vict. c. 48, ss. 14, 15.

(d) *North Eastern R. Co. v. Cairns*, 32 W. R. 829.

(e) *Nelson Colliery Co. v. L. & N. W. R. and G. W. R. Co.*, 4 Nev. & Mac. 257.

(f) *Harborne R. Co. v. L. & N. W. R. Co.*, 2 Nev. & Mac. 169. For form of order to distinguish, see *Bailey v. L. C. and D. R. Co.*, 2 Nev. & Mac. 69.

(g) *Oxley v. N. E. R. Co.* (No. 3), 3 Nev. & Mac. 85.

(h) *Ib.*

(i) *Watkinson v. Wrexham & Co.* (No. 8), 3 Nev. & Mac. 446.

(k) *Jones v. North Eastern R. Co.*, 2 Nev. & Mac. 208. In *Howard v. Midland R. Co.*, 3 Nev. & Mac. 263, the Commissioners refused an order to distinguish minerals on the ground that no terminal services were performed for the applicant.

(l) *Hall v. L. B. & S. C. R. Co.*, 4 R. & C. T. C. 393.

(m) *Barry v. L. C. & D. R. Co.*, 4 R. & C. T. C. 310.

(n) *Colman v. G. E. R. Co.*, 4 R. & C. T. C. 108.

(o) *Birchgrove Steel Co. v. Midland R. Co.*, 6 R. & C. T. C. 229.

3. Terminal Charges.

or duty of a carrier, where any such service is performed by the company), shall not exceed the following sums," &c.

Customer ought to have option of dispensing with terminal services.

What are not such services.

*L. & Y. R. Co. v. Gidlow.*

It was held by the House of Lords, upon a clause substantial identical with the above, (1) that the customer charged for the services mentioned in the exception ought to have a distinct option given him by the company of availing himself of them at the company's rate of charge, or of doing them himself (*p*); and (2) that neither taking the waggons of a colliery owner from his own siding and attaching them to the trains of the company, nor returning them from the line of the company to the sidings, nor allowing the colliery owner to leave his coals on ground adjoining the lines, were "services within the meaning of the exception, although the last thing named, the allowing the deposit of coal, might have been made the subject of an agreement for extra payment (*q*).

Station sidings, &c.  
*Hall's Case.*

It was also held by a Divisional Court (*r*), that station accommodation, the use of sidings, weighing, checking, clerkage, watching and labelling, provided and performed by a company in respect of goods traffic carried by them as carriers, may be and *prima facie* are services incidental to the business or duty of a carrier; also that whether they are so or not in any particular case, is a question of fact for the Railway Commissioners, so that if they are found to be so the services may be the subject of an additional charge (*s*).

Modern special Acts also usually contain the following clause:—

"Terminal station."

"No station shall be considered a terminal station in regard to any goods conveyed on the railway unless such goods have been received thereat directly from the consignor, or are directed to be delivered thereat to the consignee."

Cleansing of cattle trucks under Contagious Diseases Act;

under cattle plague orders.

By the Contagious Diseases (Animals) Act, 1869, 32 & 33 Vict. c. 70, s. 62, railway companies were bound to cleanse and disinfect, at the Privy Council should direct, all trucks, horse boxes, and vehicles used by them for the carrying of animals. Where a "cattle plague order" directed that every carriage-truck required to be cleansed should be "cleansed and disinfected once in twenty-four hours during the time when it is used for any animal;" and by a clause in the special Act, the defendants' maximum rate of carriage of animals included every expense incidental to conveyance, "except for extra ordinary services performed by the company, in respect of which they might make a reasonable extra charge," it was held that the d

(*p*) *Lancashire and Yorkshire R. Co. v. Gidlow* (No. 1), 42 L. J., Ex. 129.

(*q*) *Lancashire and Yorkshire R. Co. v. Gidlow* (No. 2), L. R., 7 H. L. 517; and see *Isle of Wight R. Co.'s case*, 4 R. & C. T. C. 128.

(*r*) The Court of Appeal had no jurisdiction to hear an appeal against this judgment. *Hall v. L. B. & S. C. R. Co.*,

L. R. 17 Q. B. D. 230—C. A.

(*s*) *Hall v. L. B. & S. C. R. Co.*, L. J. 15 Q. B. D. 505; 53 L. T. 345, overruled *Berry v. L. C. & D. R. Co.*, 4 R. & C. T. 310, and *Kempson v. G. W. R. Co.*, 4 R. & C. T. C. 426. See *Hall's case* criticised by the Railway Commissioners in the 12th Annual Report, cited 5 R. & C. T. at p. 48.

fendants could not charge the owner of a cow which they had carried for him with the cost of cleansing the truck, as such cleansing was not a service performed for the owner within the meaning of the special Act (f). The Act of 1869 is repealed and replaced by an Act of 1878, a corresponding though differently worded provision, of which (sect. 32, par. xxi., post, Vol. II.) would seem to have a similar effect.

The weighing of goods for the convenience of the consignee is, though not expressly authorized by a terminal clause, incidental to the statutory powers of a railway company, which may maintain an action to recover charges for such a service (u). Weighing.

An action to recover for loss of goods delivered to be carried is "founded on contract" within the meaning of the 116th section of the County Court Act, 1888 (x), replacing the 5th section of the County Court Act, 1867, which *prima facie* deprives a plaintiff of costs if he fail to recover 20*l.* in an action founded on contract, or 10*l.* in an action founded on tort, but an action to recover for loss of goods delivered to a consignee after notice to the company of election to stop in transitu, is an action founded on tort within that section (y). Breach of contract on tort.

#### 4. *The Restriction imposed by the 7th Section of the Railway and Canal Traffic Act, 1854, upon Special Contracts as to the carriage of Goods and Animals.*

4. *Special Contracts as to Goods and Animals.*

At common law, carriers were always able to limit, by special contract, their liability of insurers of the goods and animals delivered to them for carriage (z); and the 6th section of the Carriers Act, to which we shall presently refer, expressly saved the power to make such special contracts. Railway companies were not slow to avail themselves of this power, and many questions speedily arose between them and their customers both as to the meaning of such contracts and as to whether they were brought to the notice of consignors. It was decided in numerous cases that the companies were enabled by such contracts to exempt themselves from the effects of even gross negligence (a); and it was also established to be immaterial whether

\* Page 578.

(f) *Cox v. Great Eastern R. Co.*, L. R., 4 C. P. 181; 38 L. J., C. P. 153.

(u) *London and North Western R. Co. v. Price*, L. R., 11 Q. B. D. 485; 52 L. J., Q. B. 754.

(x) *Fleming v. Manchester, Sheffield and Lincolnshire R. Co.*, L. R. 4 Q. B. D. 81—C. A.

(y) *Pontifex v. Midland R. Co.*, L. R.,

3 Q. B. D. 23.

(z) *Wylde v. Pickford*, 8 M. & W. 443; *Chippendale v. Lancashire and Yorkshire R. Co.*, 21 L. J., Q. B. 22.

(a) See *Carr v. Lancashire and Yorkshire R. Co.*, 7 Exch. 707; 21 L. J., Ex. 201, and the series of cases reviewed by Blackburn, J., in *Peck v. North Staffordshire R. Co.*, 10 II. L. C. 473, p. 563, post.

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the consignor signed a written document or not, and that it was sufficient if a ticket were delivered to him, or even if a verbal statement were made to him by a booking clerk (b).

Such a state of law, under the peculiarities of railway traffic, gave rise to a general dissatisfaction, which led to the interference of the Legislature. Accordingly, by the 7th section of the Railway and Canal Traffic Act, 1854, the following restrictions are imposed :—

Company to be liable, notwithstanding notices, 17 & 18 Viet. c. 31, s. 7.

Conditions must be reasonable.

Limitation of amount of liability.

\* Page 573, post. Claimant to prove value.

Special contracts must be signed.

Saving of Carriers Act.

"Every such company as aforesaid (c) shall be liable for the loss of or for any injury done to any horses, cattle or other animals, or to any articles, goods or things, in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition or declaration being hereby declared to be null and void: *Provided always*, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods or things, as shall be adjudged by the court or judge, before whom any question relating thereto shall be tried, to be just and reasonable: *Provided always*, that no greater damages shall be recovered for the loss of or for any injury done to any of (d) such animals, beyond the sums hereinafter mentioned; (that is to say,) for any horse fifty pounds; for any neat cattle, per head, fifteen pounds; for any sheep or pigs, per head, two pounds; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared (e) them to be respectively of higher value than as above mentioned, in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage (f) upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner proscribed in the statute 11 Geo. 4 & 1 Will. 4, c. 68,\* and shall be binding upon such company in the manner therein mentioned: *Provided also*, that the proof of the value of such animals, articles, goods and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: *Provided also*, that no special contract between such company and any other parties respecting the receiving, forwarding or delivering of any animals, articles, goods or things as aforesaid, shall be binding upon or affect any such party, unless the same be signed (g) by him or by the person delivering such animals, articles, goods or things respectively for carriage: *Provided also*, that nothing herein contained shall alter or affect the right, privileges or liabilities of any such company under the said act, 11 Geo. 4 & 1 Will. 4, c. 68, with respect to articles of the descriptions mentioned in the said act."

(b) *Morville v. G. N. R. Co.*, 21 L. J., Q. B. 319; *Walker v. York and North Midland R. Co.*, 2 E. & B. 750; 23 L. J., Q. B. 73; *York and Berwick R. Co. v. Crisp*, 23 L. J., C. P. 125.

(c) I. e. (see s. 2), "Railway company, canal company, and railway and canal company." The statute does not, therefore, apply to cases where ordinary carriers use a railway for the purpose of carrying cattle. But it is more extensive than the Carriers Act, which only apply to carriers by land.

(d) See *Harrison v. L. B. & S. O. R. Co.*, 29 L. J., Q. B. 209. These words should be read as "any of the following of such animals."

(e) Knowledge by the company without declaration will not entitle them to increased charge. *Robinson v. L. & S. W. R. Co.*, 34 L. J., C. P. 234.

(f) In *Robinson v. L. & S. W. R. Co.*, a London special jury found 5 per cent. on additional value of horse above 50*l.*, for carriage about 50 miles reasonable. Some companies charge a small additional percentage per mile, while others charge an equal percentage whatever the distance may be.

(g) See *Peck's Case*, *infra*. Parol evidence of an additional contract was admitted in *Malpas v. L. & S. W. R. Co.*, *Harr. & Ruth*, 227.

This obscurely-worded section (*h*) has given rise to considerable litigation. It was established in 1863, but not until after the question had been three times brought before the Exchequer Chamber (*i*), that all parts of the section must be read together, and that the conditions spoken of as capable of being imposed by railway companies in limitation of their liability as common carriers must not only be in the opinion of the Court or judge just and reasonable, but must also be embodied in a written contract, signed by the consignor of the animals or goods. This was decided by the House of Lords in *Peck v. North Staffordshire R. Co.* (*k*).

Special contracts must be signed and reasonable.

*Peck v. North Staffordshire R. Co.*

The facts were shortly these. Mr. Peck desired to send some marble chimney-pieces to London. Messages and notes passed between him and the agents of the defendants as to the terms on which they were to be carried. The agent stated, as a condition, that the company would not be responsible for damage unless the value were declared and the chimney-pieces insured, the rate of insurance being fixed at 10 per cent. on the declared value. After some delay, the agent received a short note signed by the agent of the plaintiff, requesting that the marbles might be forthwith sent to London "not insured." They were sent accordingly and suffered damage. It was held by the majority of the House of Lords, that there was not any contract signed within the meaning of the section; that the note could not be so connected with the other communications as to constitute the required contract; and that the plaintiff was entitled to recover (*l*).

Special contract must be signed by consignor.

Lord Westbury, in giving judgment, in concurring with the interpretation put upon the section by Jervis, C. J., in *Simons v. Great Western R. Co.* (*m*), observed:—

"I think that the true construction of the section may be expressed in a few words. I take it to be equivalent to a simple enactment that no general notice given by a railway company shall be valid in law for the purpose of limiting the

(*h*) It is said in argument in *Brul v. South Devon R. Co.*, 29 L. J., Ex. at p. 444, to have been suggested to Mr. Cardwell by Messrs. Daxendale & Co. It was inserted in the House of Lords on the motion of Lord Lyndhurst, and it has been said that the intention of it was that a company under the first proviso might give a general notice limiting their liability, and that it is a mistake to hold (as it has been held by the House of Lords) that the condition was intended to be void if not signed. Per Bramwell, B., in *Cohen v. S. E. R. Co.*, L. R., 1 Ex. Div. at p. 219.

(*i*) *M'Almus v. Lancashire and Yorkshire R. Co.*, 5 H. & N. 327; *Peck v. North Staffordshire R. Co.*, E. R. & E. 386; *Harrison v. L. & D. R. Co.*, 2 B. &

S. 152.

(*k*) 10 H. L. Cas. 473; 32 L. J., Q. B. 241, diss. Lord Chelmsford. Both the history of the cases and the policy of the law are elaborately reviewed in the opinions of the seven judges (Blackburn, Willes, Grompton and Williams, J.J., Martin, B., Pollock, C. B., and Cockburn, C. J.) who delivered opinions for the guidance of the House. The case itself is said by Lord Bramwell in *M. S. & L. R. Co. v. Brana*, 8 App. Cas. at p. 718, to have been wrongly decided, and to be known to Lord Bramwell "to be contrary to the intention of the framers of the act."

(*l*) It was also held that the condition was not "reasonable."

(*m*) 18 C. B. 803, at p. 820.

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common law liability of the companies as carriers. Such common law liability may be limited by such conditions as the Court or judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person."

After giving an opinion that the special condition before the Court was not "reasonable," Lord Westbury proceeded:—

"It is not only necessary that the conditions should be just and reasonable; it is also necessary that it should be embodied in a special contract in writing signed by the owner of the goods or the person delivering them. And the second question that arises, although in truth the first point [as to the 'reasonableness'] would dispose of the whole case, is, whether there does exist in this case any special contract in writing signed by the owner of the goods, or the person delivering the goods. It is insisted by the company that that requisition of the statute is answered and fulfilled by the letter of the 1st August, 1857; it is contended that the words 'not insured,' which are found in that letter, refer to and incorporate that condition. I am clearly of opinion that there is no foundation for that contention on their part, and I am also of opinion that it is not competent, by any description or parol evidence, so to interpret the words 'not insured' as to embody or incorporate the condition itself into the letter, and thereby make it a special contract in writing. Such special contract in writing, signed by the party delivering the goods, must itself, either in terms or by distinct reference, set out or embody the condition in question. But I am of opinion that those words 'not insured' do not refer to the written condition, or afford any ground upon which the written condition can be regarded as incorporated with the letter. In order to embody in the letter any other document or memorandum or instrument in writing, so as to make it part of a special contract contained in that letter, the latter must either set out the writing referred to, or so clearly and definitely refer to the writing, that by force of the reference the writing itself becomes part of the instrument it refers to."

Lord Cranworth and Lord Wensleydale concurred, the former intimating that the onus of proof is upon a railway company to show that the conditions of a special contract are "just and reasonable."

Signature.

A signature is binding although the party signing cannot read (n); and it has been held that signature by a common agent is sufficient (o). The words of the section, however, are that the special contract shall not affect the party "unless the same be signed by him or the person delivering," and it is perhaps doubtful whether parol evidence could be admitted to show that the party or person delivering constituted a servant of the company his agent to sign.

It seems to be the better opinion that the section is confined in its

(n) *Kirby v. G. W. R. Co.*, 18 L. T. 558; *Foreman v. G. W. R. Co.*, 33 L. T. 852. (o) *Aldridge v. G. W. R. Co.*, 33 L. J., C. P. 161; 15 C. B., N. S. 582.

application to cases where the loss or injury is occasioned by the neglect or default of the company, so that if a loss be occasioned by pure accident, a special contract will be valid, although it be neither signed nor reasonable (*p*).

Application of section to negligence only.

The words "loss of or injury to" appear to have been taken from the Carriers Act. It seems that they will include either a temporary or a permanent loss arising from a mis-delivery; and they have been assumed to be applicable to a delay resulting in loss of market, and not in injury to the goods or animals themselves (*q*). Deterioration of cattle from want of food and water is an "injury" (*r*).

Loss of or injury to

Loss of market.  
"Injury."

Contributory negligence on the part of the consignor would seem to excuse the company (*s*).

Contributory negligence of consignor.

The necessity of the signature applies only where the company is seeking to exempt itself from liability by the terms of the contract, so that, if the consignor be setting up the contract, it is no answer to say that he has not signed it (*t*).

Non-application of section to case where consignor sets up contract.

The limitation of liability applies to injury happening prior to booking. Where a horse backed upon some girders negligently left in the station of the defendants and was killed, it was held, by the Exchequer Chamber, that the owner could not recover more than 50*l.*, although the injury happened before the declaration of increased value could be made in the ordinary course (*u*).

Injury before booking.  
Horse.

Dogs, it will be observed, are not expressly named in the opening general enumeration of "horses, cattle, or other animals," and are not included in the special enumeration of "horses, neat cattle, sheep or pigs," with respect to which there is a limit of liability. They are, however, clearly included by implication in the opening enumeration (*x*), and were probably not mentioned therein, in analogy to the toll clauses of the special Acts which usually comprehend them under the words "sheep, pig, or other small animal." With respect to the limitation of liability, there is none under the section; a contract, however, in the form held unreasonable in *Ashendon's Case* (*y*), would probably be held reasonable if it contained after the words "*in any case*," the words "except in case of wilful misconduct," or words to the like effect (*z*).

Dogs.

(*p*) *Harrison v. L. B. & S. C. R. Co.*, 31 L. J., Q. B., Exch., per Erie, C. J., and Keating, J., at pp. 114, 119. The Court below, however, assumed that the law was otherwise, and the point is still open.

(*q*) See *Brown's case*, L. R., 8 App. Cas. 708, and p. 568, post.

(*r*) *Allday v. G. W. R. Co.*, 31 L. J., Q. B. 5; 5 B. & S. 903; 11 Jur., N. S. 12.

(*s*) *Wise v. G. W. R. Co.*, 25 L. J., Ex. 258; 1 H. & N. 83.

(*t*) *Darrendale v. Great Eastern R.*

*Co.*, L. R., 4 Q. B. 214; 38 L. J., Q. B. 137.

(*u*) *Hodgman v. West Midland R. Co.*, 35 L. J., Q. B. 85; 5 B. & S. 173, affirming decision below, 33 L. J., Q. B. 233.

(*x*) *Harrison v. L. B. & S. C. R. Co.*, 20 L. J., Q. B. 209; 31 L. J., Q. B. 113; *Ashendon v. L. B. & S. C. R. Co.*, L. R., 5 Ex. Div. 190; *Dickson v. G. N. R. Co.*, L. R., 18 Q. B. D. 176.

(*y*) See p. 570, infra.

(*z*) See per Kelly, C. J., and Hawkins, J., in *Ashendon's case*, supra.



4. *Special Con-  
tracts as to Goods  
and Animals.*

Cloak room.  
Through traffic.

Sea traffic.

Passengers' luggage.

Conditions held  
reasonable.

Alternative  
rates.

Loss of market.

The section has no applications to goods left at the cloak room of a station (a).

Nor does it apply to a contract exempting a company from liability on a railway not worked by themselves. Therefore, a through passenger from London to Paris, and whose portmanteau was lost between Calais and Paris on a French railway, failed to recover for the loss of it from the English company (b). The section does not extend to sea traffic (c), but it extends to passengers' luggage (d).

It is important to ascertain what conditions are reasonable and what unreasonable. But it should in the first place be stated, that if conditions are separable they may be separated, and one upheld as reasonable whilst another is held void as unreasonable (e); and a reasonable condition may be applied to a state of facts which makes it unreasonable (f).

The following conditions have been held to be reasonable :—

"I beg to inform you that to parties willing to free and relieve this company, and the other railway companies over whose lines fish may be forwarded from any of our stations, from all liability for loss or damage by delay in transit, or from whatever other cause arising, the company agree that the rates charged will be one-fifth lower than where no such undertaking as the annexed is granted.

"[Signed for company.]

"In reference to the above, I request that you will forward all fish delivered by me or on my account from any of your stations at the lower rate, and I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage.

"This undertaking to continue in force from the present date (28th December, 1880), until the 31st December, 1885.

"[Signed by consignor] (g).

"Goods conveyed at special or mileage rates must be loaded and unloaded by the owner or their agents, and the company will not be responsible for any risk of stowage, loss or damage, however caused, nor for discrepancy in the delivery as to either quantity, number or weight, nor for the condition of articles so carried, nor for detention or delay in the conveying or delivery of them, however caused (h).

"That the company will not, under any circumstances, be liable for loss of market or other claim arising from delay or detention of any train, whether at starting or at any of the stations or in the course of the journey;" in answer to a claim arising from loss of market (i).

(a) *Tan Tull v. South Eastern R. Co.*, 31 L. J., C. P. 241.

(b) *Zur v. South Eastern R. Co.*, L. R., 4 Q. B. 359; 38 L. J., Q. B. 209; 20 L. T. 873.

(c) See p. 627, post.

(d) See p. 587, post.

(e) *Simons v. G. W. R. Co.*, 26 L. J., C. P. 25; *McCance v. L. & N. W. R. Co.*, 31 L. J., Ex. 65; 7 II. & N. 477; 34 L. J., Ex. 39. But see *Kirby v. G. W. R. Co.*,

18 L. T. 658.

(f) Per Martin, B., in *Gregory v. West Midland R. Co.*, 33 L. J., Ex. at p. 157.

(g) *Manchester, Sheffield and Lincolnshire R. Co. v. Brown*, L. R., 8 App. Cas. 703, and see p. 571, post.

(h) *Simons v. G. W. R. Co.*, 26 L. J., C. P. 25.

(i) *White v. G. W. R. Co.*, 26 L. J., C. P. 168. See *Deal v. South Devon R.*

"The company is to be held free from all risk or responsibility in respect of any loss or damage arising in the loading or unloading, from suffocation or from being trampled on, bruised or otherwise injured in transit, from fire, or from any other cause whatever. The company is not to be held responsible for carriage or delivery within any certain or definite time, nor in time for any particular market;" in answer to a claim for suffocated and injured cattle sent by rail (*k*).

Injury to live stock.

"No claim for deficiency, damage or detention shall be allowed unless made within three days after delivery of the goods, nor for loss unless made within seven days after the time when they should have been delivered.

Claim to be made within limited time.

"The company will not be answerable for the loss or detention of any goods untruly or incorrectly described or declared in the declaration or receiving-note furnished by the company (*l*).

Untrue description.

"The company will not undertake to convey fish except under the general conditions published at the railway stations in the train tables, and except under the following special conditions:—"That the company shall not be responsible under any circumstances for loss of market, or other loss or injury arising from delay or detention of trains, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud" (*m*).

Fish.  
Rail v. South  
Down R. Co.

A condition that the company "do not admit" liability for any animal dying of disease or arriving at destination in such condition as to walk from the truck, the expression "do not admit" being construed to mean that the liability must be established by proof (*n*).

A declaration, signed by the sender, that the value of seven horses did not exceed 10*l*. per horse (*o*).

Value of horses.

"The company will not be answerable for the loss or detention in respect of goods destined for places beyond the limits of the company's railway; and as respects the company, their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for further conveyance. Any money which may be received by the company as payment for the conveyance of goods beyond their own limits will be so received only for the convenience of the consignors, and for the purpose of being paid to the other carrier" (*p*).

Limiting responsibility of company to their own line.  
*Alldridge v. G. W. R. Co.*

*Co.*, *infra*, *n*. (*m*); *Lord v. Mulland R. Co.*, 36 L. J., C. P. 170; *Mathers v. Dublin and Drogheda R. Co.*, 17 Ir. C. L. R. 87.

(*k*) *Pardington v. South Wales R. Co.*, 26 L. J. Ex. 106; but see *M'Manus v. Lancashire and Yorkshire R. Co.*, 28 L. J., Ex. 353; 4 H. & N. 327; *post*, p. 570 (*l*).

(*l*) *Lewis v. G. W. R. Co.*, 29 L. J., Ex. 425; 5 H. & N. 867.

(*m*) *Deal v. South Devon R. Co.*, 29 L. J., Ex. 441; 5 H. & N. 876, affirmed in Exch. Ch., 12 W. R. 1115; 11 L. T. 184; 3 H. & C. 887. The "train tables" gave notice that fish was conveyed by "special agreement only, and on the express condition that the sender should sign" a declaration "exempting the com-

pany from all liability for loss or injury arising from delay or detention of train, or from any other cause other than gross neglect or fraud."

(*n*) *Great Western R. Co. v. McCarthy*, L. R., 12 App. Cas. 218, and p. 572, *post*.

(*o*) *M'Cauley v. L. and N. W. R. Co.*, 31 L. J., Ex. 65; 7 H. & N. 477; 34 L. J., Ex. 39; 3 H. & C. 313. The declaration of value was held to be no part of the contract. It was also held, that payment of money into Court admitted the unqualified contract declared upon. See also *Robinson v. G. W. R. Co.*, 35 L. J., C. P. 123; *Harr. & Ruth*, 97.

(*p*) *Alldridge v. G. W. R. Co.*, 33 L. J., C. P. 161; 15 C. B., N. S. 582.

4. *Special Contracts as to Goods and Animals.*

Negligence.  
Burden of proof.  
Conditions held unreasonable.

A condition for liability for negligence only, at lower rate, is reasonable (g); and in such case the onus of proving the negligence is on the plaintiff (r).

On the other hand, the following conditions have been held to be unreasonable. A condition that—

Improper packing, in answer to loss.

"The company will not be accountable for the loss, detention or damage of any package insufficiently or improperly packed, marked, directed or described, or containing a variety of articles liable by breakage to damage each other (s).

Horses to be carried at owner's risk

"This ticket is issued subject to the owner's undertaking all risk of conveyance, loading and unloading whatsoever, as the company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles (t).

*Roth v. North Eastern R. Co.*

"The bearer undertakes all risk of loading, unloading and carriage, whether arising from the negligence or default of the company or their servants, or from defect or imperfection in the station, platform or other places of loading or unloading, or of the carriage in which they may be loaded or conveyed, or from any other cause whatsoever (u).

Requirement to insure hazardous goods.

"That the company shall not be responsible for the loss of or injury to any marbles, musical instruments, toys or other articles, which from their brittleness, fragility, delicacy or liability to ignition are more than ordinarily hazardous, unless declared and insured according to their value (v).

Dogs.

*Harrison v. L. B. & S. C. R. Co.*

"The company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent at the time of booking, shall have been given to them; and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value so declared. The company will in no case be liable for any injury to any horse or other animal, or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2*l.* 10*s.* per cent. or 6*d.* per pound upon the declared value above 40*l.*, whatever may be the amount of such value and for whatever distance the horse or other animal is to be carried (y).

"The company are not and will not be common carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for any amount of damages for the loss thereof, or for injury thereto,

(g) *Harris v. Midland R. Co.*, 25 W. R. 68 (cows).

(r) *Ib.*; *Smith v. Midland R. Co.*, 45 L. T. 813 (cows).

(s) *Simons v. G. W. R. Co.*, 26 L. J., C. P. 25; *Horton v. Bristol and Exeter R. Co.*, 30 L. J., Q. B. 273; 1 B. & S. 112. For case of non-liability where the company had declined to pack furniture, see *Barbour v. S. E. R. Co.*, 34 L. T. 67.

(t) *M'Almus v. L. and Y. R. Co.*, 28 L. J., Ex. 358; 4 H. & N. 327; reversing *N. C.*, 27 L. J., Ex. 201; 2 H. & N. 893. See, also, *M'Cluer v. L. & N. W. R. Co.*, 31 L. J., Ex. 65; 7 H. & N. 477; 31 L. J.,

Ex. 39; *Gregory v. West Midland R. Co.*, 33 L. J., Ex. 155, acc.; *Robinson v. G. W. R. Co.*, 35 L. J., C. P. 123; *Harr. & Roth*, 97.

(u) *Roth v. North Eastern R. Co.*, 36 L. J., Ex. 88.

(v) *Peck v. North Staffordshire R. Co.*, 32 L. J., Q. B. 241; 10 H. L. C. 473.

(y) *Ashendon v. L. B. & S. C. R. Co.*, L. R., 5 Ex. D. 190, where it is said that *Harrison v. L. B. & S. C. R. Co.*, 31 L. J., Q. B. 113, in which the very same condition was held reasonable by the Exchequer Chamber, is overruled by *Peck v. North Staffordshire R. Co.*, *supra*, p. 565.

beyond the sum of 2%, unless a higher value be declared at the time of delivery to the company, and a percentage of 5 per cent. paid upon the excess of value beyond the 2% so declared (z).

"The company will not be answerable for the loss or detention of or damage "Empty to wrappers or packages of any description charged by the company as 'empties' (a).

"The company are not to be answerable for any consequences arising from Overcarriage, detention or delay in or in relation to the conveying or delivery of the said animals, however caused (b).

**"The company will not be responsible for any passenger's luggage unless fully and properly addressed, with the name of the owner" (c).**

It has become a common practice for companies to offer "alternative rates," that is, a higher rate, at which the company undertakes the full risk of a carrier, and a lower rate at which it carries upon condition of being relieved from that risk. These alternative rates have frequently come before the Courts, and it appears that the conditions have been upheld as just and reasonable, if the company offer a *bonâ fide* option, and if the higher rate is reasonable as well as the lower one. Such is the effect of *Manchester, Sheffield, and Lincolnshire R. Co.*, apps., *Brown*, resp. (d), in which a fish merchant relieved the company "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of an alternative rate one-fifth lower than the ordinary, and the House of Lords held that such a contract was just and reasonable, and that the company were not liable for loss of market arising from a pressure of business whereby they failed to carry fish in time. It had previously been held by the Court of Appeal in *Lewis v. Great Western R. Co.* (e), in which the same principle was laid down, that a reduced rate of 40s., "owner's risk," for nearly four tons of cheeses from London to Shrewsbury, the ordinary, which was also the maximum rate, being 60s., was just and reasonable, and exempted the defendants from liability for damage arising from their servants having negligently packed the cheese.

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(2) *Dickson v. G. N. R. Co.*, L. R., 18 Q. B. D. 176; 56 L. J., Q. B. 111; 55 L. T. 368; 35 W. R. 202—C. A. The company, however, were held not to be common carriers of dogs, but only bound to afford reasonable facilities for their carriage.

(a) *Alldridge v. U. W. R. Co.*, 33 L. J., C. P. 161; 15 C. B., N. S. 582.

(b) *Allday v. U. W. R. Co.*, ante, p. 567, n. (r); and see *Kirby v. U. W. R. Co.*, 18 L. T. 658, per Martin, B., at Nisi Prius.

(c) *Cutler v. North London R. Co.*, L. R., 19 Q. B. D. 61; 56 L. J., Q. B. 618; 56 L. T. 639; 35 W. R. 575.

(7) *Manchester, Sheffield and Lincolnshire R. Co.* app., *Brown* resp., L. R., 8 App. Cas. 703; 53 L. J., Q. B. 124; 50 L. T. 291; 32 W. R. 207, reversing C. A., Baggallay, Brett, and Lindley, L.J.; 10 Q. B. D. 250; 52 L. J., Q. B. 132, and restoring C. B. D. (Matthew and Cave, JJ.), 9 Q. B. D. 230.

(c) *Lewis v. Great Western R. Co.*, L. R., 3 Q. B. D. 195; 47 L. J., Q. B. 131; 37 L. T. 774; 26 W. R. 255—(C. A. See also, as to alternative rates, *Gullinger v. G. W. R. Co.*, Ir., 8 C. L. 320; *Loyal v. Limrick and Watford R. Co.*, 15 Ir., C. L. 37; *Foreman v. G. E. R. Co.*, 38 L. T. 851; *Harris v. M. R. Co.*, 25 W. R. 63.

4. *Special Contracts as to Goods and Animals.*

"Owner's risk."

Publication of higher rate.

"Wilful misconduct."

"Detention."

Power to exceed maximum for animals.

The expression "owner's risk" means only the risk arising during an ordinary transit, and does not include any injury arising from delay or negligence on the part of the company (*f*).

The higher rate need not be published in the manner that tolls are directed to be published by sect. 93 of the Railways Clauses Act, 1845; the posting up the effect of it, as that it is ten per cent. above the owner's risk rate, is enough (*g*).

An exception for "wilful misconduct,"—which has passed into conditions as a common form—comprehends only actual wilful misconduct with knowledge that it will probably result in injury (*h*), as where a station master kept goods, misdirected to "Jeeves," for a week, and then delivered them, without previous inquiry of the consignor, to a person of the name of "Jarvis" (*i*).

The withholding of cattle under a groundless claim to retain them, at the end of the transit, is not "detention" within the meaning of conditions that the company are not to be liable in respect of loss or detention or injury except upon proof that such loss, &c., arose from wilful misconduct. This was held in a case where cattle were delivered at Waterford to be carried to Gloucester, but were detained at Gloucester in consequence of the negligent omission of the defendants' clerk at Waterford to enter them on the consignment notes as "carriage paid" (*k*).

It would seem that the "reasonable percentage," which the companies are authorized to demand by the section for the carriage of certain animals of high value, may exceed the maximum fixed by the special Acts, so far as the animals specified in the section are concerned. With regard to animals not specified, and with regard to goods, the section gives no power to exceed the maximum, and the higher "alternative rate" must in any case not exceed it (*l*).

### 5. *The Protection afforded by the Carriers Act.*

5. *Protection afforded by the Carriers Act*

In consequence of the hardship of having at common law to carry as insurers goods of any size and value, it became a common practice

(*f*) *Robinson v. G. W. R. Co.*, 35 L. J., C. P. 124; *Porter v. L. & N. W. R. Co.*, L. R. 9 C. P. 325; 30 L. T. 763; 23 W. R. 919.

(*g*) *Great Western R. Co. v. McCarthy*, L. R. 12 App. Cas. 218; 56 L. J., P. C. 33; 56 L. T. 582; 35 W. R. 429.

(*h*) *G. W. R. Co. v. Gleabster*, 20 L. T. 422; 22 W. R. 72; *Webb v. G. W. R. Co.*, 26 W. R. 111; and see per Bramwell, L. J., in *Lewis's case*, 3 Q. B. D. at p. 206.

(*i*) *Hoare v. G. W. R. Co.*, 37 L. T. 186; 25 W. R. 63.

(*k*) *Gordon v. G. W. R. Co.*, L. R., 8 Q. B. D. 44; 51 L. J., Q. B. 58; 45 L. T. 509; 30 W. R. 230.

(*l*) See per Cockburn, C. J., in *Peck v. North Staffordshire R. Co.*, 10 H. L. C., at p. 561. As to the power to charge above the maximum for special service, see p. 546. ante.

## SECT. 5.—PROTECTION AFFORDED BY THE CARRIERS ACT.

for carriers to publish notices to the effect that they would not be liable for property above a certain value, unless the nature and value of the property was declared and an increased charge paid; the result was that many questions arose as to the construction of these notices, and whether they had been brought to the knowledge of persons forwarding goods (*m*). To remedy the uncertainty thus occasioned, and to relieve carriers from the hardship above mentioned, the Carriers Act was passed in 1830, "somewhat hurriedly, and at the instance of two private members, without having been based upon any public inquiry" (*n*). Although not passed specially with reference to railways, as is shown by the words of the preamble as well as by the date of the act, it is a statute of the greatest importance to railway companies.

The first section sets forth the mischief of the act, and provides the remedy, in the following terms:—

"Whereas by reason of the frequent practice of bankers and others, of sending by the public mails, stage-coaches, waggons, vans and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire, is greatly increased; and, whereas, through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses: Be it therefore enacted, that no mail contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles, or property, of the descriptions following; (that is to say,) gold or silver coin of this realm, or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the Banks of England, Scotland and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes or securities for payment of money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles, or property aforesaid, contained in such parcel or package shall exceed the sum of 10*l*., unless, at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her or their book-keeper, concubiner or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles, or property, shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

Carriers Act 1830, 4 & 5 Will. 4, c. 63. Preamble.

Sect. 1. Carriers not be liable for loss of certain property above the value of 10*l*. unless value declared and increased charge paid.

(*m*) See *Oluyton v. Hunt*, 3 Camp. 27, and the other cases collected in the notes to *Coggs v. Bernard*, 1 Smith's L. C. 228,

7th edition.

(*n*) Report of Select Committee of House of Commons, 1877.

5. Protection  
afforded by the  
Carriers Act.

Object of the act.

To what kinds of  
loss the act  
applies.

Negligence.  
Overcarriage.

Extent of  
protection.

The object of this act is twofold; first, that the carrier receiving the article may be apprised of its nature, in order that he may give it a proportionate degree of protection; and secondly, that, as he incurs an additional danger and risk, he should have an increased compensation (*o*). The enacting part of the first section goes beyond the preamble, and extends to the particular articles enumerated, even where they are not articles "of great value in a small compass;" so that a *large* looking-glass is within the act (*p*). "Value" means actual value to the party suing: where manufacturers allowed a discount to a merchant, who consigned jewellery to an intending purchaser, which was lost in transit, it was held that such discount could not be deducted (*q*). Although the act applies only to carriers by land, still, a contract to carry partly by land and partly by water is divisible, and in such a case the carrier is entitled to the protection afforded by the act, provided the loss took place on land (*r*).

The act protects the owner in case of a loss arising from gross negligence of the carrier (*s*); and in case of a loss of or injury to goods negligently carried beyond their destination (*t*). Nor is the carrier deprived of the protection of the act merely by the fact that the loss of the goods is temporary and not permanent; nor can the owner of the goods recover damages for the consequences of the loss, *e.g.* for the being compelled to replace the goods at enhanced prices. This was held by the Court of Appeal in *Miller v. Brusch & Co.* (*u*), in which the defendants, being carriers from London to Rome, had mis-sent to New York a trunk consigned to them for carriage by rail from London to Liverpool, and by ship from Liverpool to Italy. But where the carrier detained goods which have not been lost, he cannot set up the act in answer to a claim arising out of the detention. This is explained, in *Miller v. Brusch*, to be the effect of *Heurn v. L. & S. W. R. Co.* (*v*), which was decided on demurrer.

The result of the above decisions appears to be that the protection of the act extends to cases of loss or injury caused by any accident or negligence, even though the acts done may technically amount to a conversion of the goods, but does not extend to cases where the carrier, or those for whom he is responsible, wilfully and purposely

(*o*) Per Bayley, B., in *Owen v. Burnett*, 2 Cr. & M. at p. 359.

(*p*) *Owen v. Burnett*, 2 Cr. & M. 358; 4 Tyw. 133.

(*q*) *Blackburn v. L. & N. W. R. Co.*, 15 L. T. 761.

(*r*) *Le Coultur v. L. & S. W. R. Co.*, 35 L. J., Q. B. 10; 6 B. & S. 961; L. R., 1 Q. B. 51; *Piancini v. L. & S. W. R. Co.*, 18 C. B. 226; *Baxendale v. H. E. R. Co.*, L. R., 4 Q. B. 244; 10 B. & S. 212.

(*s*) *Hinton v. Dublin*, 2 Q. B. 846.

(*t*) *Morrill v. North Eastern R. Co.*, L. R., 1 Q. B. D. 302; 45 L. J., Q. B. 289; 34 L. T. 940; 21 W. R. 386—C. A.

(*u*) L. R., 10 Q. B. D. 142; 52 L. J., Q. B. 127; 47 L. T. 685; 31 W. R. 190—C. A., reversing Lopes, J., 8 Q. B. D. 35; *Wallace v. Dublin and Belfast Junction R. Co.*, 11 R., 8 C. L. 341, and *Piancini v. L. & S. W. R. Co.*, 18 C. B. 226, are to the same effect as to the temporary loss.

(*v*) *Heurn v. L. & S. W. R. Co.*, 10 Ex. 793; 21 L. J., Ex. 180.

# SECT. 5.—PROTECTION AFFORDED BY THE CARRIERS ACT.

does any act inconsistent with the contract to carry, which occasions loss or injury. If goods be delivered to a carrier for a certain purpose, and he wilfully do something else with them he would seem to be liable notwithstanding the statute (y).

We will now proceed to notice the numerous decisions as to particular descriptions of goods. Some of the titles of the articles enumerated in the section explain themselves, so that no question can arise as to what the titles include. Such judicial decisions as have been given with reference to the others will now be noticed in the order in which the several titles occur in the section.

A chronometer comes under the description of a timepiece (z). Timepieces

In *Bernstein v. Bussendale* (a) it was held that ivory, black and agate bracelets, shirt-pins, common gilt rings, brooches, tortoiseshell and pearl portmonnaies, and glass smelling-bottles, are trinkets, but German silver fuzee-boxes are not. In giving judgment, Cockburn, C.J., said (b)— Trinkets.

“With respect to the shirt-pins, bracelets, gilt rings, brooches, tortoiseshell portmonnaies and smelling-bottles, there is a distinction between some of these articles which are used as ornaments to the dress and others which do not constitute any portion of the dress, and are only occasionally produced, but which, when so produced, are of an ornamental character. The first of these classes, such as shirt-pins, bracelets, rings and brooches properly come within the definition of trinkets. I think that their object is not utility, but essentially ornament; but even supposing their main object to be that of forming some part of the dress, still, if they are intended to be, as these clearly are, ornamental to the apparel, they are, I think, trinkets. There is more difficulty in dealing with the other portion of these articles, which are not always exhibited, but only produced occasionally, that is, when wanted, these are the portmonnaies and glass smelling-bottles. I think that although these may be articles of use and necessity, yet, if by the superaddition of so much ornament there is given to them such a character as to make their main object ornament, they are trinkets. The intention of this act is to protect carriers of articles of small bulk but of considerable value, and therefore, if the articles are open to such a construction as to bring them within the act, we ought to adopt that construction. The fuzee-boxes of German silver cannot, however, I think, fall within the definition of trinkets. They are made of plain materials, and the main, indeed almost the sole, purpose to which they can be applied is the use for which they were evidently intended; these are clearly articles of use and not ornament and are not trinkets.”

Where a document in the form of a bill of exchange for 11*l.* 10*s.*, accepted by the person to whom it was directed, but having no Bill, note securities, writings.

(y) See the judgment of Blackburn, J., in *Morritt v. North Eastern R. Co.*, L. R., 1 Q. B. Div. 308; and *Turnell v. Willard*, 5 B. & A. 58, which latter case turned on a notice very similar in its terms to sect. 1 of the act.

(z) *Le Couteur v. L. & S. W. R. Co.*, L. R., 1 Q. B. 54; 35 L. J., Q. B. 40; 6 B.

& S. 961.

(a) 6 C. B., N. S. 251; 28 L. J., C. P. 265, overruling *Dacey v. Mason*, Car. and M. 45, in which an eye-glass and gold chain attached were said by Lord Abinger not to be trinkets.

(b) 28 L. J., C. P. 267.



*5. Protection  
afforded by the  
Carriers Act.*

drawer, was sent by railway in a parcel directed to the person who was intended to insert his own name as drawer, and to whom the person who signed as an acceptor was indebted, and was lost, the Court of Queen's Bench held that the Carriers Act did not apply, for the document was not a bill of exchange, nor a promissory note, nor a security for money; and, though it was a writing, was of no value beyond that of the paper (c).

This decision shows that a *security* is an instrument which may be put in suit (d).

Maps.

The cases of maps are not separable from the maps themselves (e), ~

Engravings.

Prints and coloured prints have been held to be engravings (f).

Pictures.

A picture and its frame are considered as one article, and the carrier is protected from liability for damage to the frame (g).

Paintings.

The word "paintings" denotes works of art, and does not include coloured imitations of rugs and carpets and coloured working designs, although valuable, designed by skilled persons and painted by hand, if they have no value as works of art (h).

Glass.

Glass includes glass of any kind or size (i).

Silks.

In *Hart v. Baxendale* (k), silk tights and silk hose; in *Bernstein v. Baxendale* (l), silk watchguards; in *Brunt v. The Midland R. Co.* (m), "elastic silk webbing," which is a woven fabric composed of silk, indiarubber and cotton, one-third of the material being silk, and in *Flowers v. The South Eastern R. Co.* (n), a silk dress, were held to be *silks* within the meaning of the act.

It is clear from these decisions that *Davey v. Mason* (o) is not law.

Furs.

Hat-bodies made of fur and partly of wool are not furs (p).

Lace.

Where a lace corporal, or communion cloth, in a gilt frame, covered with glass, was lost, it was held that the lace and glass only, and not the frame, came within the act (q). By the Carriers Act Amendment Act, 1865 (r), the term "lace" is to be construed as not including machine-made lace.

(c) *Shossup v. S. E. R. Co.*, 3 K. & B. 549; 23 L. J., Q. B. 293. Eile, J., stated that he wished to leave the question open, whether, if the jury had found that the writing was of value, the finding could have been sustained. See also *McCall v. Taylor*, 19 C. B., N. S. 301; 31 L. J., C. P. 365.

(d) See also *Goldsmit v. Hampton*, 5 C. B., N. S. 94; 27 L. J., C. P. 258.

(e) *Wight v. Parkford*, 8 M. & W. 443.

(f) *Boys v. Park*, 3 C. & P. 361.

(g) *Anderson v. L. & N. W. R. Co.*, 30 L. J., Ex. 55; L. R., 5 Ex. 90.

(h) *Woodward v. L. & N. W. R. Co.*, L. R., 8 Ex. D. 121; 47 L. J., Ex. 263; 38 L. T. 321; 26 W. R. 354.

(i) *Owen v. Burnett*, 2 T. & M. 353; 4 Tyrw. 133.

(j) 6 Exch. 769; 20 L. J., Ex. 338; 21 L. J., Ex. 123.

(k) 3 C. B., N. S. 251; 28 L. J., C. P. 265.

(l) 2 H. & S. 889; 33 L. J., Ex. 187. In this case the Court had power to draw inferences of fact, but expressed an opinion that the question was one for the jury.

(m) 16 L. T. 329.

(n) Car. & M. 45.

(o) *Mynher v. Nelson*, 6 C. & P. 58.

(p) *Treadwin v. G. E. R. Co.*, L. R., 3 C. P. 308; 37 L. J., C. P. 83.

(r) 23 & 29 Vict. c. 21.

SECT. 5.—PROTECTION AFFORDED BY THE CARRIERS ACT.

Where the plaintiff had packed paintings in his own waggon, which was put on a railway truck, it was held that the waggon was a "parcel or package" within the meaning of the act (*s*).

The declaration of the value and nature of the goods must be made whether the goods are delivered at the office of the carrier, the sender's house, on the road, or anywhere else. This was decided by the Exchequer Chamber in *Bawendale v. Hart* (*t*). It is said by the Court of Error—

Declaration  
value and  
of goods.

"We think that the act of Parliament requires the person who sends the goods to take the first step by giving that information to the carrier which he alone can give, and that if the sender does not take that first step, then he cannot maintain this action by the force of the first section, which expressly says that the carrier shall not be liable unless the declaration is made. Such declaration when made will lead to other consequences: the carrier will know what he is to have more according to the tariff which he has stuck up in his office; if that sum is paid and the goods are lost, then of course he would be liable. On the other hand, if he refuses to give a receipt as provided by the statute, or has omitted to comply with any provision of that kind on his part to be performed, he would lose the protection given by the act."

If the value and nature of the articles has been declared, and the carrier receives them without demanding any extra charge, and no extra charge is paid, the carrier is not protected (*u*). It is not essential that the declaration of value should be express and formal (*x*).

Declaration  
not be form

The 2nd section empowers the carrier to demand an increased rate of charge, upon giving public notice of it, in the following terms:—

"When any parcel or package, containing any of the articles above specified, shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving-house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge."

Demand of  
increased rate  
sect. 2.

The carrier must still demand the increased charge, or he will be liable (*y*). A railway company may demand an increased charge for carrying cattle of greater value than the amount prescribed by

(*s*) *Whit v. Lancashire and Yorkshire R. Co.*, L. R., 9 Ex. 67; 43 L. J., Ex. 47.

(*t*) 6 Exch. 769; 21 L. J., Ex. 123; reversing *Hart v. Bawendale*, 20 L. J., Ex. 338.

(*u*) *Behrens v. G. N. R. Co.*, 6 H. & N. 866; 30 L. J., Ex. 153; affirmed, 7 H. &

N. 950; 31 L. J., Ex. 299.

(*x*) *Boulbury v. Sutton*, 19 W. R. 800; 21 W. R. 128; overruling, though not expressly, a dictum of Lord Denman, C. J., in *Boys v. Pink*, 8 C. & P. 363.

(*y*) *Behrens v. G. N. R. Co.*, 30 L. J., Ex. 153; 31 L. J., Ex. 299; 7 H. & N. 950.

3. Protection  
afforded by the  
Commons Act.

the Railway and Canal Traffic act, 1854 (z), and the notice must be given in the manner prescribed by the above section (a).

Receipt to be  
signed, sect. 3 ;

no carrier to lose  
benefit of this  
act.

Public notices  
not to limit  
liability, sect. 4.

By sect. 3 : " When the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty ; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge."

By sect. 4 : " No public notice or declaration hereafter to be made shall be deemed or construed to limit, or in anywise affect the liability at common law of any such mail contractors, stage-coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them, but all such mail contractors, stage-coach proprietors, or other common carriers as aforesaid, shall be liable, as at the common law, to answer for the loss of, or any injury to, any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding" (b).

Sect. 4 is confined to public notices, and, therefore, where printed notices limiting the carrier's liability were brought to the knowledge of the plaintiff by being personally served on him, it was held that the jury were justified in inferring a special contract on the terms of the notices, which exempted the carriers from liability though the plaintiff had not signed any contract. This decision was in 1853, shortly before the passing of the Railway and Canal Traffic Act which, by sect. 7, renders it necessary, in order that conditions limiting the liability of railway companies as carriers of goods shall be binding, that they shall be such as shall be adjudged just and reasonable, and shall be embodied in a signed contract (c).

Every office, &c.  
a receiving  
house, sect. 5.

By sect. 5 : " For the purposes of this act, every office, warehouse or receiving house (d), which shall be used or appointed by any mail contractor or stage-coach proprietor, or other such common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse or office of such mail contractor, stage-coach proprietor or other common carrier ; and that any one or more of such mail contractors, stage-coach proprietors or common carriers shall be liable to be sued by his, her or their name or names only ; and that no action or suit commenced to recover damages for loss or injury to any parcel, package or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, stage-coach or other public conveyance by land for hire as aforesaid."

Special contracts,  
not affected,  
sect. 6

By sect. 6 : " Nothing in this act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage proprietor or common carrier and any other parties for the conveyance of goods and merchandise" (e).

(z) 17 & 18 Vict. c. 31, s. 7.

(a) Ante, sect. 4.

(b) See *Hulton v. Dibbin*, 2 Q. B. 616.

(c) *Pick v. North Staffordshire R. Co.*,

10 H. L. 475, 173, and p. 587, ante.

(d) See *Symes v. Chaplin*, 5 A. & E. 634,

in which case the defendant was a coach proprietor, and an inn at which more coaches than the defendant's called was held to be a receiving house.

(e) See ante, sect. 4. The question whether a carrier is not bound to carry

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In *Baxendale v. Great Eastern R. Co. (f)* the railway company owned a railway from Harwich to London, and also owned a ship; and pictures were delivered to their agents at Rotterdam for conveyance thence to London, the bill of lading stating that the goods were "to be delivered at the port of London via Harwich (the act of God, &c. as also railway accidents, being excepted), and the owners being in no way liable for any of the causes above excepted." The goods were conveyed by the company's ship to Harwich, and were lost on the railway between Harwich and London. It was held that the company were protected by the Carriers Act. It was decided that the 6th section applied only to contracts the terms of which were inconsistent with the exemption claimed by the carriers under sect. 1, and that the true effect of the contract by means of the bill of lading was that the goods, so far as related to the carriage from Harwich to London, were delivered to the defendants in their character of common carriers; and they were to have all the liabilities of common carriers, except those excepted in the bill of lading; and they were also entitled as common carriers to the protection from liability conferred on them by sect. 1.

Part carried by sea.

By sect. 7: "Where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcel or package shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charge so paid as aforesaid."

Parties entitled to damages recover the increased charge.

By sect. 8: "Nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct."

Not to protect felonious acts.

Although not actually employed by the company themselves, a servant employed by an agent of the company to receive goods at a receiving house is a servant "in the employ" of the company within the 8th section, so that the company are liable for the felony of such servant. So it was held in *Machell v. L. & S. W. R. Co. (g)*, which was followed with approval in *Stephens v. L. & S. W. R. Co. (h)*.

Servant at receiving house is servant of company. *Machell v. L. & S. W. R. Co.*

Proof of a felony by the carrier's servants is a sufficient answer to a defence under sect. 1, without proof of negligence on the part of the carrier (i).

Proof of negligence unnecessary, say if felony proved.

without a special contract if the sender of the goods tender a reasonable sum for their carriage is raised but not decided in *Carr v. Lancashire and Yorkshire R. Co.*, 21 L. J. Ex. 261; 7 Exch. 707. If this liability exists it is clearly only in the case of goods which the carrier's public calling requires him to carry. *Ibid.*

(f) *Baxendale v. Great Eastern R. Co.*,

L. R., 4 Q. B. 244; 38 L. J., Q. B. 137.

(g) 2 Ex. 115.

(h) L. R., 15 Q. B. D. 121; 58 L. J., Q. B. 171; 56 L. T. 226; 35 W. R. 161—C. A.

(i) *G. W. R. Co. v. Rimnell*, 27 L. J., C. P. 201; 18 C. B. 535; *Metcalf v. L. B. & S. C. R. Co.*, 27 L. J., C. P. 205; 4 C. B., N. S. 307, on demurrer.

3. *Principle applied by the Courts.*

DECISIONS as to evidence of felony.

*Boyce v. Chapman.*

Sect. 8 has also given rise to numerous decisions as to what is sufficient evidence to go to the jury of a felony having been committed by the carrier's servants.

In *Boyce v. Chapman* (k), a 10*l.* note, which formed part of the money that had been lost while in the defendant's charge, was traced to the defendant's porter a considerable time after the loss, and the jury having found for the plaintiff the Court of Common Pleas refused to disturb the verdict, holding that there was evidence to go to the jury of a felony by the porter; for, although the evidence given would have been very slight evidence against him, in a criminal court, the defendants had it in their power to call him, and ought to have done so.

*G. W. R. Co. v. Rimmell.*

Evidence of felony by company's servants.

*Metcalfe v. L. B. & S. C. R. Co.*

*The Great Western R. Co. v. Rimmell* (l), was decided in favour of the company on the grounds that the facts proved were only sufficient to raise a suspicion, and there was no evidence that a felony had been committed by anyone. In *Metcalfe v. The London, Brighton and South Coast R. Co.* (m) the company succeeded on the ground that there was no evidence to fix the company's servants, it being quite consistent with the facts of the case that the felony had been committed by some person not in their employ.

*Vaughton v. L. & N. W. R. Co.*  
Not necessary to show felonious act of particular servant.

In *Vaughton v. The London and North Western R. Co.* (n), a parcel of jewellery was sent by the defendant's line from Birmingham to Liverpool, and lost. A carman employed by the defendants' agent to deliver parcels took two parcels to a hotel, and presented his book, which mentioned three, for signature; the missing parcel was the plaintiff's. Some days afterwards a pin, which had been in the parcel, and pieces of the wood of the box, were found on a siding of the defendants, and another pin was found in the possession of one of the defendants' servants. The defendants called no witnesses, and the jury for the plaintiff. The Court of Exchequer discharged a rule to enter a verdict for the defendants, holding that it was not necessary for the plaintiff to give such evidence of felony as would have sustained a criminal prosecution against any of the defendants' servants, and that the defendants might have called the suspected servants as witnesses (o).

*M'Queen v. G. W. R. Co.*

The question again arose in *M'Queen v. The Great Western R. Co.* (p), where the Court, while approving of the decision in *Vaughton v. The London and North Western R. Co.* (supra), held that the

(k) 2 Bing. N. C. 222; 1 Hodges, 333.

(l) 27 L. J., C. P. 201; 18 C. B. 585, rule for new trial refused.

(m) 27 L. J., C. P. 333; 4 C. B., N. S. 307.

(n) L. R., 9 Ex. 93; 43 L. J., Ex. 75.

(o) The head-note to the report of this

case in the Law Reports (L. R., 9 Ex. 93) goes further than the facts of the case warrant, and cannot now be taken as stating the law correctly. See *M'Queen v. G. W. R. Co.*, post.

(p) L. R., 10 Q. B. 569; 44 L. J., Q. B. 180.

judgment of Pigott, B., in that case, which was relied on for the plaintiff, could not be entirely supported. The plaintiff had delivered a case, marked "valuable pictures with care," but not declared or insured, to the defendants at Carliff to be forwarded to London. The case was put on a truck, and left standing on a siding for about seven hours before the departure of the train. Other persons besides the company's servants had access to the siding. The case was stolen from the truck while it was standing on the siding. No witnesses were called for the defence. Cockburn, C. J., left the question to the jury, whether the case had been stolen by any of the defendants' servants, directing them that if the facts in their opinion were more consistent with the guilt of the defendants' servants than with that of any other person not in their employ, that was sufficient to call upon the defendants for an answer, which not having been given, the inference might well be that a felony had been committed by some of their servants. A verdict was found for the plaintiff, but the Court held that there was no evidence to go to the jury of a felony by the defendants' servants. Cockburn, C. J., in giving judgment said:—

"I quite agree with the doctrine involved in the decision of the Court in *Vaughton v. The London and North Western R. Co.* (*supra*) to this extent: that it is not necessary to show, in order to make out a replication of a felonious act on the part of the carriers' servants, that the taking was by any particular servant or servants. It is enough if there is proof to satisfy the jury that the taking was by some one who was more or less one of the company's servants, without specifying the particular servant. But we are now dealing with the propositions involved in the direction which I gave to the jury in this case upon what I then considered to be the substance of the judgment of Pigott, B., in *Vaughton v. The London and North Western R. Co.* The language of that judgment, however, I think, when we apply it to the particular facts of that case, must be understood in a much more limited sense than that which it would at first appear to have when looked at with reference only to the words and the language used. Looking at the language of that judgment, which I followed almost verbatim in the direction I gave to the jury in this case, it comes to this— that where in the opinion of the jury the facts are more consistent with the guilt of the defendants' servants than that of any person not in their employ, then the carrier is called upon for an answer; and if the conduct of certain persons is impugned, and those persons are not called as witnesses, the inference would be that a felony had been committed by them. I think that proposition is not maintainable.

. . . . . If a *prima facie* case is made out, capable of being displaced, and if the party against whom it is established might by calling witnesses and producing particular evidence displace that *prima facie* case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not as a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced it would not disprove the *prima facie* case. But that always presupposes that a *prima facie* case has been established; and unless we can see our way clearly to the conclusion that a *prima facie* case has been established, the omission to call witnesses who might have been called on the part of the defendants amounts to

Felony of  
servant.  
*McQueen v.*  
*G. W. R. Co.*

*Prima facie* case  
of felony by  
one servant  
must be made  
out.

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nothing. I cannot say that a *prima facie* case was made out calling upon the company for an answer, and if not then they would be entitled to take their stand on the evidence as it existed. It really comes to this—there is a greater degree of probability that the railway company's servants took these goods than that a stranger took them, by reason of their greater facilities of access and opportunities of stealing them, yet it is merely a question as between the railway company's servants and anyone else, and there is nothing whatever to point to the railway company's servants particularly, with the exception of the greater facility of access" (q).

Admissibility of  
evidence.

*Kirkstall Brewery  
Co. v. Furness  
& Co.*

In another case (r), information given by the defendants' station-master to a police constable that one of the defendants' servants was suspected of having stolen the missing parcel, was held to have been rightly admitted in evidence to show a felony by the defendants' servant.

Carriers not  
bound by decla-  
ration of value.  
Sect. 9.

By section 9, such common carriers, &c., shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but shall be entitled to require from the party suing proof of the actual value, by ordinary legal evidence, and shall be liable to such damages only as shall be proved as aforesaid, not exceeding the declared value, together with the increased charges.

Money may be  
paid into Court.

By sect 10, in all actions brought against such common carriers for loss, &c., whether the value of such goods shall have been declared or not, the defendants may pay money into Court, as in any other action.

Traffic Act, 1854.

The benefit of the act, with respect to articles of the description mentioned in sect. 1, is reserved to railway companies by the last proviso in sect 7 of the Railway and Canal Traffic Act, 1854.

\* Page 561. ante.

Unsuitability of  
Carriers' Act to  
railway traffic.

The Carriers Act appears to be not quite suited to the conditions of modern railway traffic. On the one hand, the enumeration of the protected articles is imperfect and requires revision (s). On the other hand, the charges which the companies may make are subject to no limit in law, and not unfrequently prohibitory in fact (t).

Report of House  
of Commons  
Committee, 1877.

The whole question of the operation of the act was considered by a House of Commons' Committee, which was appointed in 1875, and finally reported in 1877 to the effect that the terms of insurance adopted by railway companies were practically prohibitory, and that a maximum rate of insurance ought to be fixed by law; that silk and silk goods ought to be omitted from the act; and that if a proper rate of insurance should be fixed by law, the 8th section of the act ought to

(q) The same principles were adopted in *Campbell v. North British R. Co.*, Court of Session Cases, 4th series, vol. ii., p. 433; and *Turner v. G. W. R. Co.*, 34 L. T. 22 (C. P. D.).

(r) *Kirkstall Brewery Co. (Limited) v.*

*Furness R. Co.*, L. R., 9 Q. B. 468; 43 L. J., Q. B. 142.

(s) Report of Royal Commission, 1867.

(t) See *Drayson v. Horne*, 82 L. T. 691.

be repealed. But the Committee forbore from recommending immediate legislation, for the following very important reason :—

The representatives of the London and North Western, Midland, Great Western, Great Northern, Great Eastern, North Eastern, South Eastern, and thirteen (u) other companies, "proposed to the Committee to bind themselves for a period of five years to insure all goods within the act upon the terms and at the rate set forth in the document, set forth in the report by way of schedule, and further to bind themselves at the expiration of that period not to alter these terms or conditions *without giving to the President of the Board of Trade, and as far as may be to the public, notice of their intention to make such a change.*"

Provisional scale of insurance.

The following is the schedule above referred to :—

# SCHEDULE.

## RATES FOR THE INSURANCE OF VALUABLE PARCELS AND GOODS FORWARDED BY PASSENGER OR GOODS TRAINS.

Until further notice, all the railway companies will charge the following reduced rates for insurance over and above the common and ordinary rate of charge for carriage, for parcels and packages of any of the goods enumerated in the undermentioned classification of articles included in an Act of Parliament commonly called the "Carriers Act" :—

### CLASSIFICATION.

CLASS 1.	CLASS 2.
1. Stamps.	1. Class of all kinds, except as named in Class 4.
2. Maps.	2. China from manufacturers or factors.
3. Silk, or goods mixed with silk where silk is more than 30 per cent. of the value.	3. Precious stones, <i>set or unset.</i>
4. Furs.	4. Jewellery, <i>not</i> from or to manufacturers or factors.
5. Clocks.	
6. Timepieces.	CLASS 3.
7. Plated articles.	1. Pictures and paintings.
8. Coins, gold and silver.	
9. Gold and silver, manufactured and unmanufactured.	CLASS 4.
10. Jewellery from or to manufacturers or factors.	1. Plate glass (in plates exceeding 36 feet superficial in size cut).
11. Watches.	2. Glass (stained).
12. Gold and silver plate.	3. Glass (silvered).
13. Hand-made lace.	4. Glass (bent).
14. Engravings.	5. China (other than from manufacturers or factors).
15. Trinkets.	
16. Bank notes.	
17. Title deeds.	
18. Writings.	
19. Bills of exchange.	
20. Orders, notes, or securities, for payment of money, English or foreign.	

N.B.—In mixed silk goods where there is less than 30 per cent. of silk, the exemption of the Carriers Act is not to be pleaded at all, but all such goods are to be carried at the carrier's risk.

(u) The L. B. & S. C., The L. & S. W., The M. S. & L., The L. & Y., The Furness, The Caledonian, The N. B., The N. S., The L. C. & D., The South Devon and Cornwall, The B. & E., The Tall Vale, The G. & S. W.



## SCALE OF CHARGES.

		Between all Stations in Great Britain.				Between Stations in Great Britain and Ports in Ireland and the British Isles.											
		Class 1.		Class 2.		Class 3.		Class 4.		Class 1.		Class 2.		Class 3.		Class 4.	
		s.	d.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
Maximum charge for £ 25 or less in value		0	3	0	6	1	3	2	6	0	6	1	0	3	9	7	6
"	" 26 to £ 50	0	6	1	0	2	6	5	0	1	6	3	0	7	6	15	0
"	" 51 " 75	0	9	1	6	3	0	7	6	2	3	4	6	11	3	22	6
"	" 76 " 100	1	0	2	0	5	0	10	0	3	0	6	0	15	0	30	0
"	" 101 " 125	1	3	2	6	6	3	12	6	3	9	7	6	18	9	37	6
"	" 126 " 150	1	6	3	0	7	6	15	0	4	6	9	0	22	6	45	0
"	" 151 " 175	1	9	3	6	8	9	17	6	5	3	10	6	26	3	52	6
"	" 176 " 200	2	0	4	0	10	0	20	0	6	0	12	0	30	0	60	0
"	" 201 " 225	2	3	4	6	11	3	22	6	6	9	13	6	33	9	67	6
"	" 226 " 250	2	6	5	0	12	6	25	0	7	6	15	0	37	6	75	0
"	" 251 " 275	2	9	5	6	13	9	27	6	8	3	16	6	41	3	82	6
"	" 276 " 300	3	0	6	0	15	0	30	0	9	0	18	0	45	0	90	0
"	" 301 " 325	3	3	6	6	16	3	32	6	9	9	19	6	48	9	97	6
"	" 326 " 350	3	6	7	0	17	6	35	0	10	6	21	0	52	6	105	0
"	" 351 " 375	3	9	7	6	18	9	37	6	11	3	22	6	56	3	112	6
"	" 376 " 400	4	0	8	0	20	0	40	0	12	0	24	0	60	0	120	0
"	" 401 " 425	4	3	8	6	21	3	42	6	12	9	25	6	63	9	127	6
"	" 426 " 450	4	6	9	0	22	6	45	0	13	6	27	0	67	6	135	0
"	" 451 " 475	4	9	9	6	23	9	47	6	14	3	28	6	71	3	142	6
"	" 476 " 500	5	0	10	0	25	0	50	0	15	0	30	0	75	0	150	0

The above charges apply irrespective of distance.

The above classification, scale of charges, and the following conditions apply, whether the articles be conveyed by goods or passenger trains, but parcels up to and including 28lbs. in weight are to be insured only when sent by passenger train.

#### 6. The Carriage of Explosives.

R. C. Act, s. 103.

The 103th section of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), is as follows :—

Company not to be required to carry dangerous goods.

"No person shall be entitled to carry or to require the company to carry upon the railway any aqua fortis, oil of vitrol, gunpowder, lucifer matches, or any goods which in the judgment of the company may be of a dangerous nature; and if any person send by the railway any such goods without distinctly marking their nature on the outside of the package containing the same, or otherwise giving notice in writing to the bookkeeper, or other servant of the company with whom the same are left, at the time of so sending, he shall forfeit to the company 20*l.* for every such offence; and it shall be lawful for the company to refuse to take any parcel that they may suspect to contain goods of a dangerous nature, or require the same to be opened to ascertain the fact" (c).

This section gives a wide discretion to the company, and according to its strict grammatical construction constitutes the company sole judges as to what goods are "of a dangerous nature;" but it is conceived that the company must exercise their power of refusal in a

(c) At common law a carrier seems to have no right to open suspected parcels.

See *Urruch v. L. & N. W. R. Co.*, 23 L. J., C. P. 73; 14 C. B. 255.

reasonable manner with reference to goods not either specified in the section or *ejusdem generis* with those specified, or as to which they have by notice limited their obligations as common carriers. Looking to the special character of the section, it would seem that the Railway Commissioners, under their general powers to compel companies to afford reasonable facilities for the receiving and forwarding of traffic\* have no jurisdiction to compel a company to carry articles comprised within it. On the other hand, the section does not affect the liability of all companies under the Cheap Trains Act, 1883, to convey along with her Majesty's troops gunpowder and other combustible matters on terms agreed upon (see s. 6, sub-s. 1, par. vi. of that Act), between the Secretary at War and the companies.

\* Page 484, ante.

In order to support a conviction under the 105th section of the Railways Clauses Act, it is necessary to prove a guilty knowledge on the part of the sender of the dangerous articles. Whether a party imposing on the sender may be convicted under the section is doubtful. The sender, although without a guilty knowledge, would be liable to the company in damages (y).

No conviction without mens rea.

By a bye-law generally in force and sanctioned by the Board of Trade (z), loaded firearms may not, "except with the express permission of some officer of the company," be taken in any carriage forming a train, and "every person so offending" is liable to a penalty not exceeding 5*l*.

Loaded firearms.

The conveyance of gunpowder and other specially dangerous explosives has been placed under a series of statutory restrictions, which has now culminated in the Explosives Act, 1875 (a). The effect of the 3rd, 35th and 39th sections of this act is, that every railway company carrying gunpowder, nitro-glycerine, dynamite or any "other substance, whether similar to those above mentioned or not, used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect," must make bye-laws for regulating the conveyance of such substances. The bye-laws require confirmation by the Board of Trade, and when confirmed by the Board of Trade "shall apply" to the servants of the company and to the persons using the railway: (Sect. 35). The maximum penalty for a breach of the bye-laws is 20*l*. for each offence, and 10*l*. for each day during which the offence continues, with forfeiture of the explosives in respect of which the offence is committed; (1*b*).

Gunpowder and specially dangerous explosives.

Explosives Act 1875.

Bye-laws of railway companies confirmed by Board of Trade.

(y) *Hearn v. Clayton*, 2 E. & E. 66; 28 L. J., M. C. 216. By sect. 88 of the Explosives Act, 1875, the company is exempted from penalties under that act in case the consignor or consignee is in default, and the penalties fall upon the consignor or consignee.

(z) Bye-law No. 15, p. 517, ante.

(a) 38 Vict. c. 17, post, vol. ii. By sect. 122 and sched. i, the Gunpowder Acts (23 & 24 Vict. c. 139; 24 & 25 Vict. c. 130; 25 & 26 Vict. c. 98) are repealed, as also are the Carriage of Dangerous Goods Act, 1868 (29 & 30 Vict. c. 69), and the Nitro-Glycerine Act, 1869 (32 & 33 Vict. c. 113).

6. *The Carriage of Explosives.*

A model code of bye-laws was agreed to shortly after the passing of the act by fifty-two railway companies (b) in Great Britain, and has received the sanction of the Board of Trade. This code is printed in vol. II.

Publication of bye-laws.

By sect. 38, bye-laws must, before being sanctioned by the Board of Trade, be published in such manner as may be directed by the Board of Trade, and "every bye-law may be from time to time added to, altered or rescinded by a bye-law made in like manner and with the like sanction as the original bye-law."

Alteration of bye-laws.

By sect. 63, notice of any accident connected with explosives of a certain amount, or causing loss of life or personal injury, must be sent to the Secretary of State by either the owner of the explosive or of the carriage which conveyed it.

Notice to Secretary of State of accidents connected with explosives.

And by sect. 106 an Order in Council may from time to time "define the composition, quality and character of any explosive, and classify explosives." The leading Order in Council under this section is printed in vol. II.

Classification of explosives by order in council.

7. *The Carriage of Passengers' Luggage.*

Obligation to carry luggage without charge.

7. *The Carriage of Passengers' Luggage.*

Passengers by railways are accustomed as of right, to take a certain specified quantity of luggage, for which no charge in addition to the fare is made. This right is secured by a clause of the special act of each company. The clauses differ as to the amount allowed, but otherwise mostly follow a common form. The London and North Western Railway Company's Act of 1846 (9 & 10 Vict. c. cciv.), s. 66, provides as follows :—

"Every passenger travelling upon the railway in a first-class carriage may take with him his ordinary luggage not exceeding 112 lbs. in weight, and every passenger travelling in a second-class carriage may take with him his ordinary luggage not exceeding 60 lbs. in weight, and every passenger travelling in a third-class carriage may take with him his ordinary luggage not exceeding 40 lbs. in weight, without any charge being made for the carriage" (c).

(b) That is, by all the companies having termini in London or being members of the London Clearing House. Such companies have also given notice that they are "not common carriers of explosives." It is believed that the "model code" has been universally adopted.

(c) The clause of the G. W. R. Co. Act of 1817 (10 & 11 Vict. c. cccxxii, s. 51), and of the G. N. R. Co. Act of 1850 (13 & 14 Vict. c. lxi, s. 17), differ only verbally from the clause given above. The clauses of

the G. E. R. Co. Act of 1862 (25 & 26 Vict. c. cxxiii, s. 226), and of the L. B. & S. C. R. Co. Act of 1863 (26 & 27 Vict. c. cxxviii, s. 51, sect. 4, ante), both allow 120 lbs. to first-class passengers, 100 lbs. to second, and 60 lbs. to third-class. Otherwise these clauses also differ only verbally from the clause given above. For a form used in early Special Acts, see *Blwell v. Grand Junction R. Co.*, 5 M. & W. 669; *Bigg's Special Acts*, 1845. For model form from time to time, see the "Model Railway Bill."

Each passenger by a parliamentary train was, by sect. 6 of the Cheap Trains Act (7 & 8 Vict. c. 85), entitled to take with him 56 lbs. weight of luggage, "not being merchandize or other articles carried for hire or profit;" but that section, with other sections of the same act, is repealed by the Cheap Trains Act, 1883, 46 & 47 Vict. c. 52, which act contains no corresponding provision.

Parliamentary  
trains

The doctrine seems now to be firmly established (*d*), that railway companies receive passengers' luggage as insurers, under the same responsibility as that which was held to attach to the proprietors of coaches (*e*). The Carriers Act clearly includes passengers' luggage; and it has been decided (*f*) that the 7th section of the Railway and Canal Traffic Act, 1854, does so also.

Company liable  
as insurers.

Carriers Act and  
Traffic Act.

Page 572.

+ Page 561.

A railway company have been said not to be insurers in respect of luggage placed at a passenger's request in the same compartment in which he travels or intends to travel, and not to be without negligence on their part, liable to compensate the passenger if luggage so placed is lost or stolen. So it was laid down by the Court of Appeal in *Bergheim v. Great Eastern R. Co.* (*g*); but the correctness of this doctrine has been questioned by the House of Lords, which was of opinion in *Bunch's case* (*h*) that the contract as insurers subsists, "modified only to the extent that if loss happens by reason of want of care of the passenger himself, who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default."

Luggage placed  
in passenger  
compartment.

*Bergheim v. Great  
Eastern R. Co.*

The passenger must be travelling in the same train with the luggage in order to recover for the loss of it, so that where a passenger sent on his luggage by a servant, and himself followed by a later train, it was held that no action lay for the loss of the luggage (*i*). But a servant may sue in his own name for loss of his own luggage, although his master takes the ticket (*k*).

Servant.

(*d*) *Murrow v. G. W. R. Co.*, L. R., 6 Q. B. 612; *Cohen v. South Eastern R. Co.*, L. R., 1 Ex. Div. 217; Story on Railments, p. 324; Redfield on Railways, vol. 2, 36. But see per Pollock, C. B., in *Stewart v. L. & N. W. R. Co.*, 33 L. J., Ex. 199; and per Willes, J., in *Talley v. G. W. R. Co.*, L. R., 6 C. P. 44; and note, that the question has not come before a Court of Appeal.

(*e*) *Robinson v. Drummore*, 2 Bos. & Pul. 416; *Clark v. Gray*, 6 East, 684; 4 Esp. 177; *Brooke v. Pickwick*, 4 Blug. 218.

(*f*) *Cohen v. South Eastern R. Co.*, L. R., 1 Ex. Div. 217. This case assumes what is perhaps doubtful, and that is, the right of the companies to refuse to carry luggage except upon signed conditions.

(*g*) L. R. 3 C. P. D. 221; 47 L. J., C. P.

318; 38 L. T. 160; 26 W. R. 301—C. A., overruling or distinguishing *Richards v. L. B. & S. C. R. Co.*, 7 C. B. 839; and affirming *Talley v. G. W. R. Co.*, L. R., 6 C. P. 44; 40 L. J., C. P. 9.

(*h*) See per Lord Halsbury, L. C., L. R., 13 App. Cas. at p. 42, and post. The company appear to be bound to prove negligence in the passenger, and that the loss resulted from it, in order to escape their liability as insurers. Otherwise, as Lord Halsbury puts it, how can they escape "because they were carrying for hire in one part of a train, and not in another?"

(*i*) *Ireher v. G. E. R. Co.*, L. R., 5 Q. B. 241; 38 L. J., Q. B. 122.

(*k*) *Marshall v. York, Newcastle and Derwick R. Co.*, 21 L. J., C. P. 81; 16 Jur. 121; 11 C. B. 656.

Y. Carriage  
of Passengers'  
Luggage.  
Excursion train.

If a passenger by excursion train, "*no luggage allowed*," takes luggage, he must pay for the carriage of it, or the company may detain it for the amount (l). The case in which a company was held not liable for the loss of luggage in an excursion train, "*luggage under 60 lbs. free, at passenger's own risk*," on the ground that sect. 7 of the Railway and Canal Traffic Act, 1854, does not apply to passengers' luggage (m), has been treated as overruled in the Court of Appeal (n).

Definition of  
"luggage."

The companies being bound to carry passengers' luggage, being bound to carry it up to a certain weight for nothing, and being liable as insurers for the loss of it, it becomes of importance to decide what is "luggage" and what is not. The Railways Clauses Acts throw no light upon the question, the answer to which must first be sought in the special act of each company. The clauses of those acts respecting luggage, however, will, it is believed, be usually found to follow the common form given above, and the judgment of Parke, B., in *Great Northern R. Co. v. Shepherd* (o), contains a rule of almost universal application. In giving judgment, the learned judge observed:—

\* Page 586, ante.

"There being no special contract, the defendants were only bound to carry the plaintiff and his luggage, and under that term may be comprised his clothing, and everything required for his personal convenience, and perhaps even a small present or a book might also be included in that term; but they were certainly not bound to carry merchandise and materials intended for trade, and to be sold at a profit. Had the company, with full notice of what the passenger was carrying, chosen to treat it as luggage, they would have been responsible for the loss; but their duty as common carriers was only to carry luggage, and not merchandize or articles wholly disconnected with personal luggage. If they had had notice they might have refused to carry it without an additional payment, but they had no opportunity of acquiring this knowledge in this case. Whether this was done with any fraudulent intention it is not material to inquire, for if without any fraud the passenger has so conducted himself that the company were not apprized of the nature of what he was carrying, it is the same in effect as if a fraud had been intended."

It is clear enough, therefore, that merchandize is not luggage (p), and upon the same principle the papers of a solicitor have been held not to be comprised in the term (q). What a passenger may take

(l) *Rumsey v. North Eastern R. Co.*, 32 L. J., C. P. 241; 8 L. T. 666; 11 C. B., N. S. 611.

(m) *Stewart v. L. & N. W. R. Co.*, 33 L. J., Ex. 199; 9 Il. & C. 135.

(n) Per Brett, L. J., in *Coleman v. S. E. R. Co.*, L. R., 2 Ex. D. at p. 264.

(o) 21 L. J., Ex. 111; 8 Exch. 30.

(p) *Unhill v. L. & N. W. R. Co.*, 10 C. B., N. S. 151; 30 L. J., C. P. 289; 31 L. J., C. P. 271; *Kyys v. Belfast, &c. R. Co.*, 8 Ir. C. L. R. 167; 9 Il. L. C. 556; 8

Jur., N. S. 367. If the company take as personal luggage what they have notice not to be such, they are liable, but no contract whatever arises with respect to goods taken as luggage from the representation of the passenger. *Ib.*

(q) *Phillips v. L. & N. W. R. Co.*, 34 L. J., C. P. 259; 19 C. B., N. S. 321. Seemingly, that if each passenger is allowed 60 lbs. weight of luggage, a man and his wife may carry 112 lbs. between them, although the wife's personal luggage is

(besides clothing) as required for his personal convenience is not so easy to determine. But both a child's rocking-horse (r) and house linen (s) have been alike excluded from the term.

In one case (t) where a portmanteau was lost for three months, during which the contents were spoilt by the corruption of a brace of pheasants packed therein, the plaintiff recovered the full value, but the amount of damages had been agreed upon, the argument before the High Court turning upon other considerations, and it is submitted that damages in respect of the delay only could be recovered, on the ground of improper packing (u), and because pheasants are not personal luggage.

Damage to luggage by its own contents.

The liability of the railway companies as insurers of luggage extends not merely to the actual transit on the line, but to the period when the luggage is being taken to or from any vehicle by which a passenger comes to or leaves the station of arrival or departure (v), and, it seems, to the period during which the luggage will be lying on the platform of a station. Even where a passenger declared his intention of taking his bag in the train with him, and left it on the platform while he went to get his ticket, the Court held that there was evidence to go to the jury that the passenger had entrusted the bag to the company through a porter, who had offered to label it as "passenger's luggage" for his destination (y).

Custody of luggage on platform.

In *Great Western R. Co. v. Bunch and Wife* (z), Mrs. Bunch arrived at Paddington station at 4.20 p.m. on Christmas Eve, having with her a portmanteau, a hamper, and a Gladstone bag, intending to go to Bath by the 5.0 p.m. train, which was not yet alongside the platform. A porter took the whole luggage, and she saw the portmanteau and hamper labelled, and told him that she wished it to be put into a carriage with her. He assured her that it would be safe, whereupon she left him to meet her husband, upon her return with whom in about ten minutes, the bag was found to have disappeared. The House of Lords (Lord Bramwell, diss.) gave judgment for the plaintiffs in an action for the loss of the bag, affirming the judgment of the Court

Mrs. Bunch's Case

only 3 lbs. weight. *G. N. R. Co. v. Shipyard*, ubi supra.

(r) *Hudson v. Midland R. Co.*, L. R., 4 Q. B. 366; 38 L. J., Q. B. 213.

(s) *Macdon v. G. N. R. Co.*, L. R., 6 Q. B. 613; 40 L. J., Q. B. 300; 21 L. T. 618; 19 W. R. 873.

(t) *Hookey v. L. & N. W. R. Co.*, 50 L. J., C. P. 103.

(u) See per Matthew, J., in *Baldwin v. L. C. & D. R. Co.*, L. R., 9 Q. B. D. at p. 584.

(z) *Agrell v. L. & N. W. R. Co.*, 34 L. T. 134, n., per Pollock, B. See also

*Richard v. L. B. & S. C. R. Co.*, 7 C. B. 839; 6 Railw. Cas. 49; 18 L. J., C. P. 25; *Bulcher v. L. & S. W. R. Co.*, 16 C. B. 13.

(y) *Leach v. S. E. R. Co.*, 31 L. T. 134.

(z) L. R., 13 App. Cas. 31; 57 L. J. Q. B. 361; 58 L. T. 128; 30 W. R. 785. The decision was that there was evidence on which the County Court Judge might reasonably find that the bag was in the custody of the company for present transit from the time when it was delivered to their porter until its disappearance, and that the loss was due to their negligence.

7. Carriage  
of Passengers'  
Luggage.

Too early arrival  
of passenger.

Delivery of  
luggage on  
conclusion of  
journey.

*Midland R. Co  
v. Bromley.*  
Adjoining  
station.

of Appeal in *Bunch v. Great Western R. Co.* (a), in which Lord Esher, M. R., said that the liability of the company was that of common carriers, and both Lord Esher and Lindley, L. J., that the company could not shield themselves by a public notice that their servants had orders not to take charge of any luggage or parcels, or by a regulation in their time-tables that they would not be liable for luggage taken with passengers into the carriages. Much more, then (as had been previously held), if a passenger arrive at a station half an hour too early, and give luggage to a porter, who undertakes to *label* it, the luggage is thenceforward in the custody of the company as common carriers, and a notice by the company that "the company's servants are forbidden to take charge of any articles," and that "any article which a passenger wishes to leave at a station should be deposited in the cloak room" does not apply to such a case (b). But where the plaintiff, allowing his luggage to be taken from him by a porter, gave no instructions to the porter as to his destination, but the porter leaving, and no other porter coming forward, labelled his own luggage and then went off to the refreshment room, the Exchequer Chamber held that the plaintiff could not recover for the loss of his luggage (c); and where a passenger missed his intended train, and left his luggage in charge of a porter until the starting of the next, which was timed not to start for an hour, while he himself left the station, and went into the billiard-room of an hotel it was held that the porter took charge of the luggage on his own responsibility, and that the company were not liable for the loss of it (d).

Upon the arrival of a train at a station, it is the duty of the company to have passengers' luggage ready for delivery on the platform, at the usual place of delivery, and to keep it there for a reasonable time until the passenger in the exercise of due diligence can receive it (e); but if the passenger has an opportunity of taking it away, and, instead of taking it away, leaves it to a porter to take care of for a time, there has been a delivery by the company to the passenger and a re-delivery by the passenger to the porter as the agent of the passenger, not the servant of the company, and the company are not liable for a loss (f).

Where a passenger by the Midland Railway from Gloucester to Bristol, on arriving at Bristol terminus told a porter that he wished

(a) *Bunch v. G. W. R. Co.*, L. R., 17 Q. B. D. 215; 55 L. J., Q. B. 127; 55 L. T. 9; 31 W. R. 574—C. A., per Lord Esher, M. R., and Lindley, L. J., diss., Lopes, L. J., reversing Div. Court, 31 W. R. 74. The County Court Judge had found that the porter was negligent in fact.

(b) *Lorell v. L. C. & D. R. Co.*, 45 L. J.,

(c) *Ayrell v. L. & N. W. R. Co.*, ubi supra.

(d) *Welch v. L. & N. W. R. Co.*, 34 W. R. 166.

(e) *Putscheider v. G. W. R. Co.*, L. R., 3 Ex. D. 153; *Firth v. N. E. R. Co.*, 36 W. R. 467.

(f) *Hodkinson v. L. & N. W. R. Co.*, 14 Q. B. D. 992. 99 W. R. 469.

to proceed by the Bristol and Exeter Railway (whose station closely adjoined that of the Midland) to Torquay, and the porter thereupon placed his portmanteau on a truck with other luggage, entered the Bristol and Exeter station with the luggage, passed down an incline from the arrival platform, crossed the rails, ascended an incline to the departure platform of the Bristol and Exeter Railway, and there was no evidence that the portmanteau was ever seen afterwards, but it never reached Torquay; it was held, that there was no evidence against the Midland R. Co. of a breach of their contract to deliver, either to the passenger or at the departure platform of the Bristol and Exeter Railway (*g*).

We now pass to the question of the liability of railway companies in respect of passengers' luggage deposited in cloak rooms. There is no obligation on the companies to warehouse luggage, and luggage when warehoused is not within the terms of the 7th section of the Railway and Canal Traffic Act, which requires that the conditions upon which luggage is carried by the company should be reasonable and signed (*h*). It has, however, long been the practice of the companies to refuse to warehouse luggage except upon particular conditions, such as that they will not be answerable for the loss of luggage above a certain value, usually 10*l.*, and so forth. These conditions must be brought to the notice of the passenger, otherwise he will not be bound by them. Whether they have been brought to his notice or not is a question of evidence in each case. In *Heulerson v. Stevenson* (*i*), the House of Lords was clearly of opinion that where a passenger took his passage by sea by a ticket complete in itself on the face, he did not thereby become bound by conditions printed at the back. And in *Parker v. South Eastern R. Co.* (*k*), the Common Pleas Division held that the principle of this decision applied to a cloak-room ticket bearing on its face the words, "See back," in a case where the plaintiff swore that he did not read the writing on the back, and did not know that the writing contained conditions. But the Court of Appeal held that it was a question for the jury whether the company did what was reasonably sufficient to give the plaintiff notice of the condition (*l*), and in *Harris v. Great Western R. Co.* (*m*), the Queen's Bench Division declined to apply it to a cloak-

Cloak room

How far passenger bound by conditions of cloak-room ticket.

*Hutton v. G. W. R. Co.*

(*g*) *Midland R. Co. v. Brownly*, 17 C. B. 372; 25 L. J., C. P. 94; and see *Gilbert v. Dale*, 5 A. & E. 543, as to how far evidence of non-delivery is sufficient to fix a carrier.

(*h*) *Van Toll v. S. E. R. Co.*, 31 L. J., C. P. 242. It is said by Byles, J., in this case, that where a passenger puts a cloak-room ticket into his pocket without reading it he assents to its terms, if they be reason-

able, otherwise not.

(*i*) L. R., 2 Sc. App. 470; 32 L. T. 709.

(*k*) 34 L. T. 654; 45 L. J., C. P. 515. The jury had decided in the plaintiff's favour.

(*l*) L. R., 2 C. P. D. at p. 424.

(*m*) L. R., 1 Q. B. Div. 515; 34 L. T. 647. The Court had power to draw inferences of fact.



7. *Carriage  
of Passengers  
Luggage.*

room ticket bearing on its face the words, "Subject to the conditions on the other side," and held that a party taking such a ticket was bound by the conditions whether he read them or not. In this case, too, one of the conditions was that the company would not be liable for loss of articles, "except left in the cloak room," and the luggage was stolen from a vestibule, and not from the cloak room itself, but the Court (Lush, J., diss.), thought that this made no difference. The three cases are, it seems, distinguishable, and were treated as distinguishable in the Court of Appeal (n).

*Henderson's case* was the case of a carrier acting as such, and the two other cases were cases of a carrier acting as a warehouseman. The notice to the passenger in *Parker's case* was stronger than that in *Henderson's case*, and in *Harris's case* it was stronger than in *Parker's case*. Finally, in *Parker's case* the Court considered itself bound by the finding of the jury, whereas *Harris's case* was tried before Pollock, B., without a jury, and the Court had power to draw inferences of fact. The result of the three cases seems to be that the taking of the ticket is nowise conclusive evidence of the passenger assenting to all or any of its conditions. *Prima facie* evidence of such assent will vary in strength with the clearness with which the conditions are printed on the ticket and other circumstances, such as the degree of publicity given by general notices. But it will be a question of fact for a judge or jury, as the case may be, to decide whether, as was said by Mellish, L. J., in *Parker's case*, the company has done what was reasonably sufficient to give the plaintiff notice of the conditions, or, as it was put by Blackburn, J., in *Harris's case*, has justified the servants of the company, as reasonable men, in believing that the person bringing the goods and paying the money as part of the same transaction, receiving and carrying away the ticket, meant to assent to the terms in the ticket, and to induce them to receive the goods on those terms. Such a question, as was remarked by Lord Cairns, in *Henderson's case*, "does not depend upon any technicality of law or upon any careful examination of decided authorities (o), but appears to be a question simply of common sense."

Label  
*Munster v.  
S. E. R. Co.*

In *Munster v. South Eastern R. Co.*, the company under the powers of their act made a regulation by which passengers were required to see their luggage labelled, and that they would not be responsible for the loss or detention of any article of luggage not

(n) L. R., 2 C. P. D. at p. 121, per Mellish, L. J.

(o) Numerous authorities were cited both in *Parker's case* and in *Harris's case*. The more important of them are *Lewis v. McKie*, L. R., 4 Ex. 58; 38 L. J., Ex. 62; *York, Newcastle and Berwick R. Co. v. Criss*, 23 L. J., Q. P. 125; *Zunz*

*v. S. E. R. Co.*, L. R., 4 Q. B. 589; 37 L. J., Q. B. 209; and (by Blackburn, J.) *Fremantle v. Cooke*, 2 Exch. 668. *Parker's case* was heard after, but decided before, *Harris's case*, the Common Pleas Division being of opinion that the two cases were distinguishable.

labelled, and also another regulation by which all unclaimed property found on the company's premises was to be deposited in the lost property office, and to be restored to the owner on payment of 6*d.* for each article. The plaintiff, a passenger, required the company's porter to label and take in the luggage van a package, consisting only of wearing apparel wrapped in a shawl, properly packed and addressed, and within the allowed weight. The porter refused, as the company had made a rule not to label shawls, but offered to put it in the carriage with the plaintiff, where it was to be under his charge. This the plaintiff objected to unless it was to be at the company's risk, but did not prevent the company putting it there or in any other part of the train. The package was left behind in consequence of such refusal to label and carry it with the rest of the luggage, and was taken by a porter to the lost property office, and refused to be restored to the plaintiff except on payment of 6*d.* It was held that this was a wrongful act, for which the company were responsible, as they were not justified in refusing to carry the package with the responsibility of carriers (p).

Where a passenger, having travelled up to London by the defendant's railway, left a box at the cloak room at the station, paid 2*d.* and received a ticket, on which was a condition that the defendants would not deliver up luggage deposited without the production of the ticket, and on the following day, Sunday, called with the ticket, but could not get his box for forty minutes, whereby he missed another train by another railway, it was held, in an action against the company for damages caused by this delay, that the ticket being silent on the subject the defendants' contract was to redeliver the box within a reasonable time after reasonable demand, and that whether or not there had been unreasonable delay under the circumstances was a question for the jury and ought to be left to them (q). It has, however, been held, that the company were protected from liability to damages for delay in delivering goods deposited at the cloak room by a notice that "the company will not be responsible for any package exceeding the value of 10*l.*" (r).

Railway companies seem to have a lien on luggage for unpaid fare (s), but no right to sell the luggage (t).

Delay in redelivery of luggage left at cloak room.

*Stallard v. G. W. R. Co.*

Lien on luggage for unpaid fare.

(p) *Minster v. S. E. R. Co.*, 27 L. J., C. B. 308; 4 C. B., N. S. 676. See also *G. W. R. Co. v. Goodwin*, 21 L. J., C. P. 197; 12 C. B. 313; *Williams v. G. W. R. Co.*, 10 Exch. 15.  
(q) *Stallard v. G. W. R. Co.*, 31 L. J.,

Q. B. 137; 2 Best & S. 119.  
(r) *Piper v. S. E. R. Co.*, 17 L. T., N. S. 169.  
(s) See *Wolfe v. Summers*, 2 Camp. 631.  
(t) See *Wells v. L. & S. W. R. Co.*, L. R., 5 Ex. 62, and p. 451, ante.

8. *Carriage of  
Passengers.*

Season tickets.

A condition that a deposit on a season ticket shall be forfeited to the company if the season ticket be not given up on the very day after expiring is good, and strictly enforceable (*u*).

Companies not  
liable as insurers.  
*Redhead v.*  
*Midland R. Co.*

8. *The Carriage of Passengers.*

The obligation of railway companies to carry passengers appears to differ little from their obligation to carry goods, and has already been discussed. But the liability of the companies as carriers of passengers differs materially from their liability as carriers of goods. In respect of the carriage of passengers, railway companies are not insurers, but are liable for negligence only. This rule appears to have been always tacitly assumed; but it was first expressly affirmed in 1869 by the decision of the Exchequer Chamber in *Redhead v. Midland R. Co.* (*x*). In that case the carriage in which plaintiff was travelling got off the line and was upset, owing to the breaking of the tyre of one of the wheels. Such breaking arose from a latent defect in the tyre, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking. The Court of Queen's Bench decided that the defendants were not liable, and the Exchequer Chamber affirmed that decision. The single judgment of the Court contains the following passages:—

“It is obvious, that for the plaintiff on this state of facts to succeed in this action, he must establish either that there is a warranty, by way of insurance on the part of the carrier to convey the passenger safely to his journey's end, or as the learned counsel mainly insisted, a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care or foresight could have detected their existence. We are of opinion, after consideration of the authorities (*y*), that there is no such contract, either of general or limited warranty and insurance, entered into by the carrier of passengers, and that the contract of such a carrier and the obligation undertaken by him are to take due care (including in that term the use of skill and foresight) to carry a passenger safely. It of course follows, that the absence of such care, in other words negligence, would alone be a breach of this contract, and as the facts of this case do not disclose such a breach, and on the contrary negative any want of skill, care or foresight, we think the plaintiff has failed to sustain his action.”

After stating the law as to the carriers of goods, that the contract is “to answer for the goods in all events,” the judgment proceeds:—

“It was contended that the reason which made it the policy of the law to impose the wider obligation on the carriers of goods applied with equal force to

(*u*) *Cooper v. L. B. & S. C. R. Co.*, L. R., 4 Ex. 11, 88.

(*x*) L. R., 4 Q. B. 379; 38 L. J., Q. B. 189; 20 L. T. 628; 17 W. R. 327; affirming decision below, *Blackburn, J.*, diss., 1. R. 2 Q. D. 412.

(*y*) *Sharp v. Grey*, 9 Bing. 457; *Bremner v. Williams*, 1 C. & P. 414; *Israel v. Clark*, 4 Esp. 250; and *Alden v. New York Central R. Co.*, 12 Smith, 102, were relied on for the plaintiff; and *Aston v. Heaven*, 2 Esp. 538; *Christie v. Griegs*.

impose the limited warranty of the soundness of the carriage in favour of the passenger. The reason suggested was, as we understood it, that a passenger when placed in a carriage was as helpless as a bale of goods, and therefore entitled to have for his personal safety a warranty that the carriage was sound, but this is not the reason or anything like the reason given by Lord Holt for the liability of the carrier of goods. The argument founded on this reason, however, would obviously carry the liability of the carrier far beyond the limited warranty of the roadworthiness of the carriage in which the passenger happened to travel. His safety is no doubt dependent on the soundness of the carriage in which he travels, but in the case of a passenger on a railway it is no less dependent on the roadworthiness of the other carriages in the same train and of the engine drawing them, on the soundness of the rails, of the points, of the signals, of the masonry, in fact, of all the different parts of the system employed and used in his transport, and he is equally helpless as regards them all.

Company not  
liable as carriers.  
*Rothwell v.  
Milbon* (L. C.)

"If then there is force in the above reason, why stop short at the carriage in which the passenger happens to travel? It surely has equal force as to all these things, and if so it must follow as a consequence of the argument that there is a warranty that all these things should be and remain absolutely sound and free from defects. This, which appears to be the necessary consequence of the argument, although Mr. Manisty disclaimed the desire to press it so far, tries the value of it. But surely, if the law really be as it is now contended to be, it would have been so declared long ago. No actions have been more frequent of late years than those against railway companies in respect of injuries sustained by passengers. Some of these injuries have been caused by accidents arising from defects or unsoundness in the rolling stock, others from defects in the permanent works. Long inquiries have taken place as to the cause of these defects, and whether they were due to want of care and skill, and these inquiries would have been altogether immaterial if warranties of the kind now contended for formed part of the contract.

"An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that everything he necessarily uses is absolutely free from defects likely to cause peril, when from the nature of things defects must exist which no skill can detect, and the effects of which no care or foresight can avert, would be to compel a man by implication of law, and not by his own will, to promise the performance of an impossible thing, and would be directly opposed to the maxims of law, *Lex non cogit ad impossibilia*, *Nemo tenetur ad impossibilia*."

If the facts proved are equally consistent with the exercise and with the omission of proper care as to examination for defects, the plaintiff must be non-suited (z).

The action for negligence is an action of tort, and none the less so because there is a contract with the company to carry the passenger (u). Even although there be no express contract, an invitation

Action for negli-  
gence is action  
of tort.

2 Camp. 70; *Chaffin v. Waterhouse*, 3 Bing. 319; *Grice v. Chester and Holyhead R. Co.*, 2 Exch. 251; *Port v. L. & S. W. R. Co.*, 2 F. & F. 730; *Stokes v. Eastern Counties R. Co.*, 2 F. & F. 691; *Burns v. Cork and Brandon R. Co.*, 13 Ir. C. L. 513, and *Digalls v. Dill*, 5 Met. 1, were relied on for the defendant's

(z) *Gilbert v. North London R. Co.*, 1 Q. & B. 31.

(u) *Tutton v. G. W. R. Co.*, 29 L. J., Q. B. 181; *Bretherton v. Wood*, 9 L. & B. 51; *Martin v. G. N. R. Co.*, 18 C. B. 170; *Keys v. Belfast, &c. R. Co.*, 9 H. L. C. 550.

8. <i>Carriage of Passengers.</i>	or permission to travel in a train of a company raises a duty in the inviting company to carry safely ( <i>b</i> ). But the negligence is not a "wrong or injury disconnected with contract" within the meaning of the Irish Common Law Procedure Act, 1853, s. 243 ( <i>c</i> ). A master cannot sue the carrying company for injury to his servant on a journey for which the servant has taken the ticket ( <i>d</i> ), but he may sue, "for a pure tort," a company whose train comes into collision with the train of the carrying company ( <i>e</i> ).
Master and servant	Unless there be an intention in the passenger to defraud, the mere non-payment of fare will not, it seems, exempt the company from liability; a newspaper reporter travelling with a free pass ( <i>f</i> ) and a child above three carried free ( <i>g</i> ) have been held entitled to recover. Where a train was hired by a society, whose secretary sold a ticket to the plaintiff, it was held that this was evidence that the plaintiff had become the company's passenger ( <i>h</i> ).
Liability where fare not paid.	It is clearly established, that, in order to render the company liable for negligence, it is necessary to give affirmative proof of negligence on their part, and it is not sufficient merely to prove the occurrence of an accident and rely upon that as <i>prima facie</i> evidence of negligence. In some cases, <i>res ipsa loquitur</i> , the accident is of such a nature that negligence may be presumed from the mere occurrence of it ( <i>i</i> ). But when the balance is even, the <i>onus</i> is on the party who relies upon the negligence of the other to turn the scale ( <i>k</i> ).
Onus on passenger to prove negligence.	In all cases of negligence, the contributory negligence of the plaintiff will disentitle him to recover. That is, if the plaintiff omit to take such ordinary care as would have avoided the consequences of the negligence of the company or their servants, the liability of the company for such negligence is extinguished. And it has been held that a master cannot recover from a third person for damage, which has arisen through his own servant's negligence ( <i>l</i> ). It is not, however, sufficient, in order to exempt the company from responsibility,
Contributory negligence.	

(b) *Foulkes v. Md. District R. Co.*, L. R., 1 C. P. D. 287.

(c) *O'Sullivan v. Dublin and Wallow R. Co.*, 2 L. C. L. 124.

(d) *Allon v. Midland R. Co.*, 34 L. J., C. P. 292; 19 C. B., N. S. 213.

(e) *Berringer v. Great Eastern R. Co.*, L. R., 1 C. P. D. 163.

(f) *G. N. R. Co. v. Harrison*, 10 Ex. 370, Ex. Ch. See also *Callih v. L. & N. W. R. Co.*, 20 L. J., Q. B. 411, *Redfield on Railways*, vol. 2, p. 211 (citing *Phil. & Leeds R. Co. v. Derby*, 11 How. U. S. 193. As to liability for injury to driver travelling free at his own risk, see *McCauley v. Furmoss R. Co.*, L. R., 8 Q. B. 57, and p. 558, ante.

(g) *Austin v. G. W. R. Co.*, L. R., 2 Q. B. 442; 30 L. J., Q. B. 201. That the train

was a "parliamentary one" seems to make no difference.

(h) *Shannon v. L. B. & S. C. R. Co.*, 5 Ex. 787.

(i) See *Bird v. G. N. R. Co.*, 28 L. J., Ex. 3; *Scott v. London Dock Co.*, 13 W. R. 99; 34 L. J., Ex. 17, 220; 3 H. & C. 598; *Briggs v. Oliver*, 35 L. J., Ex. 163.

(k) *Toomey v. L. B. & S. C. R. Co.*, 27 L. J., C. P. 39; 3 C. B., N. S. 146; *Bird v. G. N. R. Co.*, ubi supra; *Corrigan v. Eastern Counties R. Co.*, 29 L. J., Ex. 94; 1 H. & N. 781; *Cotton v. Wood*, 29 L. J., C. P. 333, *Tatham v. G. W. R. Co.*, 29 L. J., Q. B. 184.

(l) *Purlington v. South Wales R. Co.*, 29 L. J., Ex. 105; *Ellis v. S. W. R. Co.*, 29 L. J., Ex. 349; 2 H. & N. 424.

to show that the party injured did by his own act *contribute* to the injury, but it must be shown that he did not use ordinary care to avoid the consequences of the negligence of the company (*m*). Whether or not he did use ordinary care would be a question for a jury (*n*), the burden of proof of contributory negligence being always upon the company (*o*). He is not identified with the driver of his own train so as to bear the consequences of such driver's contributory negligence (*p*).

It is a defence that the plaintiff voluntarily incurred the risk which led to his injury with a full knowledge of it, but both his will and knowledge are questions of fact, which must be very clearly proved for the company to avail themselves of it (*q*).

Voluntary  
incurring of  
risk.

The contributory negligence of a child has the same effect of disentitling him to maintain an action as the contributory negligence of an adult (*r*). And a child is deemed to be so identified with the person in charge of him, that the contributory negligence of such person disentitles the child from recovering damages (*s*).

Child.

The decisions as to the right of a plaintiff to have inspection of the report of the company's medical man to the company were, prior to the Judicature Acts, conflicting, but the preponderance of authority seems to have been against allowing inspection of such reports if made with a view to litigation (*t*). Inspection of a report by the general manager of the company to the Board of Trade, and of the officials of the company to the company in the ordinary course of their duty, was allowed (*u*). Since the Judicature Acts, the rule has been laid down that only documents procured by or for a solicitor for the purposes of an action are privileged (*v*), and that production is a matter of right, not a matter in the discretion of the judge (*y*). Reports of medical men procured by a solicitor for the purposes of an action are privileged (*z*).

Inspection of re-  
port of medical  
man, and other  
officials.

(*m*) *Butterfield v. Forrester*, 11 East, 60. And see *Quarck v. Dutkies*, 12 Q. B. 439.

(*n*) *Waltton v. L. B. & S. C. R. Co.*, 1 Harr. & Ruth. 424; *Hopson v. S. E. R. Co.*, 28 L. T. 271, per Brett, J.

(*o*) *Hicklin v. L. & S. W. R. Co.*, L. R., 12 App. Cas. 41, and p. 306, ante, from which, and also upon principle, it seems that the dictum of Brett, M. R., *contra*, in *Dunlop v. L. & S. W. R. Co.*, L. R., 12 Q. B. D. at p. 71, is not law.

(*p*) *The Bannin*, 38 L. T. 423, and *post*.

(*q*) *Osborne v. L. & N. W. R. Co.*, L. R., 21 Q. B. D. 220; 36 W. R. 509; and p. 599, *post*. But is not the voluntary incurring of a known risk really equivalent to contributory negligence?

(*r*) *Albott v. M.F.R.*, 10 Jan., N. S. 683; 33 L. J., Ex. 177; 2 Il. & C. 711.

of five yearsold in charge of grandmother), 28 L. J., Q. B. 253; E. B. & E. 719; Ex. Ch. And see *Singleton v. Eastern Counties R. Co.*, 7 C. B., N. S. 257.

(*t*) *Cosson v. L. B. & S. C. R. Co.*, L. R., 5 C. P. 116; *Woolley v. North London R. Co.*, L. R., 1 C. P. 602; *Skinner v. G. N. R. Co.*, L. R., 9 Ex. 298. The authorities to the contrary were *Finer v. London and South Eastern R. Co.*, L. R., 7 Q. B. 767; and *Mablin v. G. N. R. Co.*, L. R., 9 Ex. 300, *in*, both decided by the Court of Queen's Bench.

(*u*) *Woolley v. North London R. Co.*, *supra*; *Skinner v. G. N. R. Co.*, *supra*, per Bramwell, B.

(*v*) See *Bustros v. White*, L. R., 14 B. D. 423.

(*y*) *Anderson v. Bank of British Columbia*, L. R., 2 Ch. D. 611—C. A.

(*z*) *Frost v. L. C. & D. R. Co.* 1 B.

8. *Charge of  
Passengers.*  
Examination by  
medical man ap-  
pointed by court.

By the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119, s. 26), any judge of the Court in which proceedings to recover compensation for a railway accident are taken, "may order that the person injured be examined by some duly qualified medical practitioner named in the order, and not being a witness on either side."

Effect of receipt  
in full.

It is common for railway companies to compromise claims by injured passengers at an early date, and the meaning and effect of such compromises is not unfrequently disputed. A "receipt in discharge of claim in full" is not conclusive, so as to preclude the passenger from suing the company for further compensation (a).

False claims.

If the claim should be fraudulent from the fact of the plaintiff not having been present at the accident in respect of which he claims damages, evidence of an admission by the plaintiff that he was not present is clearly admissible; and so is evidence generally of an admission by the plaintiff that he has a bad case (b).

Evidence of  
negligence.

It is now proposed to consider the numerous decisions on the subject of what is "evidence of negligence" by railway companies in and about the carriage of passengers, arranged as they relate to—

(A) Management of Station, Platform and Line;

(B) Management of Train; and

(C) Management of Carriage.

#### (A) *Management of Station, Platform and Line.*

Weighing-  
machine.

In *Cornman v. Eastern Counties R. Co.* (c), the plaintiff, being sent to receive a parcel by daylight, was with a crowd of people waiting for a train, and in proceeding with them caught his foot against the edge of a weighing-machine, the base of which was raised a few inches above the level of the platform, and falling broke his kneecap; the machine was of the usual description, in its usual place adjoining the end of a counter on which passenger's luggage was placed on arrival of trains, and was used for weighing luggage. It was held, that there was no evidence of negligence by the company to go to the jury.

Full of plank  
through partition.

In *Welfare v. London and Brighton R. Co.* (d), an intending passenger, in answer to inquiries as to the departure of trains, was

*Southwick Water Co. v. Quirk*, L. R., 3 Q. B. D. at p. 321.

(a) *Lee v. Lancashire and Yorkshire R. Co.*, L. R., 6 Ch. 527, reversing *Mahm v. C.* See also *Stewart v. G. W. R. Co.*, 2 De G. J. & Sm. 319; *Roberts v. Eastern Counties R. Co.*, 1 F. & F. 160; *Ridcul v. G. W. R. Co.*, 1 F. & F. 706.

(b) *Montgomery v. L. C. & D. R. Co.*, L. R., 5 Q. B. 311.

(c) 29 L. J., Ex. 94. See also *Black-*

*man v. L. B. & S. C. R. Co.*, 17 W. R. 769; *L. & N. W. R. Co. v. Richards*, 2 B. & S. 326; *G. W. R. Co. v. Baillie*, 13 W. R. 203. In *Toomey v. L. B. & S. C. R. Co.*, 27 L. J., C. P. 39, the plaintiff, who could not read, was hurt through entering a lamp room by mistake for a mineral, and failed to recover.

(d) L. R., 4 Q. B. 693; 38 L. J., Q. B. 211; 20 L. T. 743; 17 W. R. 1065. See also *Pearson v. Plumfit* 90 T. 1199.

directed by a porter of the defendants to look at a time table, suspended on a wall under a portico of their station. While he was there a plank and a roll of zinc fell through a hole in the roof and injured him; at the same time a man was seen on the portico. It was held, that there was no evidence of negligence in the company, and that a nonsuit by Blackburn, J., was right. "There was," said that learned judge in delivering judgment in banco, "a total absence of evidence that the premises were really dangerous so as to make the company responsible" (e).

In *Shepherd v. Midland R. Co.* (f), an intending passenger fell upon a strip of ice nearly half an inch thick, extending half way across the platform. The presence of the ice being unexplained, it was held, that there was evidence of negligence.

In *Osborne v. L. & N. W. R. Co.* (g), the plaintiff, without contributory negligence, was injured by falling on slippery steps, which he knew to be dangerous, leading to a platform. There were other steps which he might have used. It was held that he was entitled to recover, as the defendants had not shown in point of fact that he voluntarily agreed to run the risk, with a full knowledge of it; and, in *Longmore v. Great Western R. Co.* (h), the company was held liable for the death of a passenger through the faulty construction of a bridge, erected across the line for the more convenient access from one platform to another, although there was a safer bridge about one hundred yards further off, which the deceased might have used. Slippery steps.  
Dangerous bridge.

In *Nicholson v. Lancashire and Yorkshire R. Co.* (i), the level crossing between the platforms at a railway station, which formed part of the "way out" for passengers arriving at the south platform, was blocked for more than ten minutes by the train in which the plaintiff arrived, and under such circumstances it was usual for the arriving passengers to walk alongside and round the end of the train in order to cross the line, a practice not objected to by the company. The plaintiff, in so doing in the dark, stumbled over a hamper which had been taken out of the train and placed at the side of the line some distance from the platform; it was held, that there was evidence of negligence on the part of the company. Stumbling over hamper.

The case of *Hogan v. South Eastern R. Co.* (k) seems to establish, that if a company allows a platform to be overcrowded, and does not provide adequate protection in the case of an unusual influx of passengers, the company may be liable for injury Overcrowded platform.

(e) See on this point *Turley v. Ashton*, L. R., 1 Q. B. Div. 314.

(f) 25 L. T. 879; 20 W. R. 705.

(g) L. R. 21 Q. B. D. 220; 36 W. R. 300.

providing wooden steps nosed with brass, without a handrail, was held no evidence of negligence.

(h) 19 C. B. N. S. 183.

(i) 19 C. B. N. S. 183.



8. *Manager of  
Passengers.*

Overcrowded  
platform.  
*Metropolitan R.  
Co. v. Jackson.*

arising from the mere action of the crowd. And the same principle was recognised in *Metropolitan R. Co. v. Jackson* (l), although the plaintiff did not ultimately succeed. The plaintiff was a passenger by the Metropolitan Railway. At the Gower Street Station, the plaintiff's compartment being full, three extra passengers got in, notwithstanding the plaintiff's remonstrances. At the next station (Portland Road) there was a large crowd, and more passengers attempted to enter, but were prevented by the plaintiff and his fellow-passengers. The train moved on and, the door being shut by a porter, the plaintiff's hand was crushed in the hinge. It was held by the Court of Common Pleas that, though taken singly, these circumstances might not have been sufficient evidence of negligence, yet, combined, they showed such carelessness as to justify the jury in finding a verdict against the company. The Court of Appeal was equally divided, but the House of Lords were unanimous for the company, on the ground, not that there had been no negligence on the part of the company, but that there was no evidence connecting with the accident the undoubted negligence in allowing the extra passengers to get in at Gower Street.

Adjoining  
stations.

In *Tebbutt v. Bristol and Exeter R. Co.* (m), the Bristol stations of three companies adjoined each other; and a passenger, who had neither travelled or was about to travel over the defendants' line, was injured by a portmanteau falling from a truck, in passing from one to the other, over ground used commonly by the passengers of the three companies. It was held that he might recover from the company whose servant caused the injury, to whom the premises actually belonged,—not, however, because they owned the premises, but because the injury was caused by a servant of the defendants acting in the course of his employment.

Falling girder.  
*Daniel v. Metropolitan R. Co.*

Where a girder, used in the construction of works over the railway, fell upon the train in which the plaintiff was travelling; it was held by the House of Lords that there was no evidence of negligence on the part of the company in giving no signal of the approach of the train, and taking no precautions to avoid the accident (n).

### (B) *Management of Train.*

Collision.

A collision between two trains of the same company is *prima facie* evidence of negligence (o). Running off the line seems also to be

(l) L. R., 3 App. Cas. 103, 47 L. T., C. P. 303; 37 L. T. 679; 26 W. R. 175, reversing judgment of C. A., L. R., 2 C. P. D. 125, 40 L. J., C. P. 376, 30 L. T. 185; 25 W. R. 661, and of C. P., L. R. 10 C. P. 19; 14 L. T., C. P. 83; 31 L. T. 475; 23 W. R. 78.

(m) L. R., 6 Q. B. 73; 10 L. J., Q. B. 78. This decision rests on the fact that

the defendants would have been liable if the injury of the plaintiff had arisen from a defective state of the premises. See as to this, *Monnell v. Smyth*, 29 L. J., C. P. 203; 7 C. B. N. S. 731.

(n) *Daniel v. Metropolitan R. Co.*, L. R., 5 H. L. 45.

(o) *Skinner v. L. B. & S. C. R. Co.*, 5

*prima facie* evidence of negligence (*p*), which may however be entirely rebutted by proof that the accident was caused by the wrongful act of a stranger (*q*). But a company over whose line defendants run by arrangement are not such strangers (*r*). And in the absence of evidence to the contrary, the presumption is that a train belongs to the company owning the line on which it runs (*s*).

Numerous cases have arisen where a passenger has been injured by alighting from a railway carriage which has stopped short of or over-shot the platform, or is drawn up where there is a space between the edge of the platform and the door of the carriage. In most of these cases the plaintiffs succeeded (*t*), but in some they failed (*u*). The facts are always very special; and it has been more than once observed by a learned judge, that each case of the kind must depend on its own particular circumstances (*v*). It will, therefore, be sufficient to examine three leading cases in detail. Of these, one was taken to the House of Lords, and the other two to the Exchequer Chamber. They are *Bridges v. North London R. Co.* (*y*), decided by the House of Lords in 1874; *Cockle v. South Eastern R. Co.* (*z*), decided by the Exchequer Chamber in 1872; and *Siner v. Great Western R. Co.* (*a*), decided by the Exchequer Chamber in 1869.

In *Bridges v. North London R. Co.*, the facts were these. Mr. Bridges, whose widow was the plaintiff in the action, lived at Highbury, and had been a season ticket-holder on the railway for some time, travelling daily between that place and Broad Street, the City terminus of the railway. He was 52 years old, and very near-sighted. On the London side of Highbury Station there was a tunnel. In the tunnel there was first a piece of hard rubbish lying by the side of the rails, then a short sloping piece of ground, then a piece of flat plat-

(*p*) *Darson v. Manchester, Sheffield and Lancashire R. Co.*, 5 L. T. 682; *Bird v. G. N. R. Co.*, 25 L. J., Ex. 3. As to nature of rail, see *Pym v. G. N. R. Co.*, 2 F. & F. 620.

(*q*) *Lath v. Rumney R. Co.*, 27 L. J., Ex. 153.

(*r*) *Blake v. G. W. R. Co.*, 31 L. J., Ex. 318, and *sect. 10*, *post*.

(*s*) *Ayles v. S. E. R. Co.*, L. R., 3 Ex. 116; 37 L. J., Ex. 101.

(*t*) *Foy v. L. B. & S. C. R. Co.*, 18 C. B., N. S. 225, questioned by *Hammes, J.*, in *Siner v. G. W. R. Co.*; *Whittaker v. M. S. & L. R. Co.*, 22 L. T. 515; *Freger v. Bristol and Exeter R. Co.*, 24 L. T. 165; *Thompson v. Belfast, Holmwood and Bangor R. Co.*, Ir. R., 5 C. L. 517; *Gill v. G. E. R. Co.*, 26 L. T. 245; *Cockle v. S. E. R. Co.*, L. R., 6 C. P., 321; *Nicholls v. Great Southern and Western R. Co.*, Ir. R., 7 C. L. 40; *Weller v. L. B. & S. C. R. Co.*, L. R., 9 C. P. 126; *Bridges v. North London R. Co.*, L. R., 7 H. L. 213; *Rob-*

*son v. North Eastern R. Co.*, L. R., 10 Q. B. 271; 44 L. J., Q. B. 112; L. R., 2 Q. B. D. 85—C. A.; *Ross v. North Eastern R. Co.*, L. R., 2 Ex. D. 248—C. A.

(*u*) *Siner and Wife v. G. W. R. Co.*, L. R., 4 Ex. 117; *Harold v. G. W. R. Co.*, 11 L. T. 410; *Phon v. Midland R. Co.*, per *Bramwell, B.*, at *Nisi Prius*, 21 L. T. 836; *Levis v. L. C. & D. R. Co.*, L. R., 9 Q. B. 66.

(*v*) *Per Kelly, C. B.*, in *Ross v. North Eastern R. Co.*, 31 L. T. 765; *per Coleridge, C. J.*, in *Robson v. North Eastern R. Co.*, L. R., 2 Q. B. D. at p. 86.

(*y*) L. R., 7 H. L. 213; 43 L. J., Q. B. 151; 30 L. T. 811; 23 W. R. 62, reversing both judgment of Exchequer Chamber, L. R., 6 Q. B. 577; 40 L. J., Q. B. 188, and of Queen's Bench, L. R., 5 C. P. 459 *u. (1)*.

(*z*) L. R., 7 C. P. 321; 41 L. J., C. P. 110; 27 L. T. 320; 20 W. R. 751.

(*a*) L. R., 1 Ex. 117; 38 L. J., Ex. 67; 20 L. T. 111.

Over-shooting platform, &c.

*Bridges v. North London R. Co.*

8. *Carriage of  
Passengers.*  
—  
Overshorting  
platform.

form, being a continuation of the main platform, but narrower, and within the tunnel. The train left the two last carriages within the tunnel, which was not lighted, and was filled with steam. The last carriage but one stopped opposite the narrow platform, and the last carriage, in which Mr. Bridges was seated, opposite the hard rubbish. The name of the station was called out, and a passenger, who had alighted from the last carriage but one, heard the warning, "Keep your seats." The train moved on to the station, but while it was still in the tunnel, Mr. Bridges alighted, and received certain injuries of which he afterwards died.

Blackburn, J., was of opinion that there was no evidence to go to the jury of negligence on the part of the defendants, and nonsuited the plaintiff. The Court of Queen's Bench refused a rule to set aside the nonsuit, and the Exchequer Chamber, by a majority of four to three, affirmed the judgment of the Queen's Bench. But the House of Lords unanimously reversed the decisions of both the Courts below.

Lord Cairns, after pointing out that some of the facts were perfectly clear, viz., that before the accident occurred the train had come to a standstill; that the carriage in which the deceased was seated was inside the tunnel; that there was no platform opposite that part of the tunnel where his carriage stopped; that the tunnel at the place in question was, even on a clear night, imperfectly lighted, and that on the night in question, being filled with steam, it was practically without light; that opposite the carriage where the deceased was sitting there was in place of a platform a heap of hard rubbish; and that if the deceased in that state of things got out in the tunnel opposite the rubbish, he was exposed to the danger of receiving a fall from alighting on the rubbish in place of alighting on the platform, proceeded to observe:—

"Up to that point, it appears to me, that there neither is negligence nor evidence of negligence to go to a jury. It was not negligence to stop the train in the tunnel; it was not necessarily negligence not to have a platform in the tunnel. But the question, and the only question in the case appears to me to be this: Was there evidence to go to the jury, that in this state of things, the company or its servants so conducted themselves as to lead to the deceased getting out of the carriage at the time that he did get out of it? Now I certainly do not desire to ask your Lordships to lay down any rule whatever as to what may be the consequence as a positive rule of law, of calling out the name of a station, by the officers of a company. But what was stated in evidence in this case, and at the stage at which the trial stopped, was uncontradicted, was this:—A passenger, who was in the last carriage but one, was called as a witness, and gave evidence that he heard 'Highbury' called at the far end of the platform. He got out; and after he got out, he heard a warning 'Keep your seats,' after which the train moved on to the station. Hearing a groan, he had proceeded farther back into the tunnel, and found the deceased lying with his legs across the rails, having sustained injuries which, it is admitted, caused his death.

Now, in that state of things, the train having actually stopped, the servants of the company having called out 'Highbury,' a station at which the train was intended to stop, and the requisite time having elapsed (as was proved by the witness whom I referred to) for any of the passengers to get out, and leave the carriage; and then the same servants of the company having corrected their mistake, and called out 'Keep your seats,' thereby admitting that the first call was an invitation to leave the seats; in that state of things, it appears to me, that without explanation or contradiction from the other side, there clearly was, upon the facts which I have stated, evidence to go to the jury of negligence on the part of the servants of the defendants. I am bound to say, that if it had fallen to me to review the verdict of a jury given against a company under those circumstances, without any evidence to explain the facts which I have stated, I should have been of opinion that the jury had come to a proper conclusion. But the only question which your Lordships have to deal with is, was there in this case evidence of negligence to go to the jury? In my opinion, there clearly was."

Lord Hatherley entirely concurred (b); and added that, when the name of a station has been called out accompanied by a stoppage, and a considerable interval has elapsed, there is a certain amount of evidence to go to the jury to authorise the finding of a verdict for the plaintiff (c).

This is also the *ratio decidendi* in *Cockle v. South Eastern R. Co.* (d). There the plaintiff, who lived at Deptford, took a ticket from Spa Road to Deptford by a train of the defendants which was due at Deptford about midnight. She travelled third class, in the last carriage of the train. The platform at Deptford was long enough for the whole train to have been drawn up alongside of it, but in addition to the part at which passengers could alight it, extended some distance, gradually receding from the rails. The body of the train drew up alongside the platform, but the last carriage was opposite the receding part of it, at which passengers could not alight, and was about four feet from it. The trains did not usually draw up at this spot, nor could the passengers alight there with safety. The part of the platform at which the train would in the ordinary course have stopped was well lighted, but the lights towards the place where the accident happened had been put out, because at that place the trains did not usually stop or the passengers alight. There was a lamp-post opposite the point where the plaintiff's carriage stopped, the lamp on which was not lighted, and the place was dark. It was a very dark night. Just before the train stopped a woman in the same carriage with the plaintiff rose for the purpose of getting out.

Train brought to  
final standstill  
*Cockle v. S. E.  
R. Co.*

(b) Lord Colonsay heard the argument, but died before judgment was delivered.

(c) The Exchequer Chamber was unanimous that the calling out of the name of a station is not of itself an invitation to

alight. See L. R., 6 Q. B. 387, 397, and 405.

(d) L. R., 7 C. P. 321, before Cockburn, C. J., Blackburn and Mellor, JJ., and Pigott and Cleasby, BIs.

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but was told by the plaintiff to wait until the train had stopped. When the train stopped the plaintiff waited for the woman to get out, but as she did not do so, opened the door and stepped out. On doing so she fell in the space between the carriage and the platform, a space wide enough for three people to stand abreast, and was injured by the fall. There was no evidence of any invitation to alight having been given by any of the defendants' servants. But it was clear that the train had been brought to a final standstill, as it was not again set in motion until it started on its journey. No warning was given to the persons in the carriage in which the plaintiff was not to alight until the plaintiff had been seen to fall, when, on the woman before referred to attempting to follow her, a cry of "Hold hard" was heard.

The jury having found for the plaintiff, Bovill, C. J. (who tried the case), and Brett, J., were of opinion that this verdict ought to stand, but Keating and M. Smith, JJ., thought that a nonsuit ought to be entered. The Exchequer Chamber, however, was unanimous that the verdict ought to stand. In the considered judgment of the Court the following passage, from the judgment of Cockburn, C. J., in *Preyer v. Bristol and Exeter R. Co. (e)*, is cited with approval:—

"I adopt most readily the formula which has been suggested as applicable to these cases, viz., that the company are bound to use reasonable care in providing accommodation for passengers, and that the passengers also are bound to use reasonable care in availing themselves of the accommodation provided for them. Therefore I agree that a passenger is bound to use reasonable care in alighting on the platform or elsewhere when it becomes necessary for him to alight. . . . It has been said that it is not always possible to bring up carriages to the platform at stations, and one's own experience tells us that this is true. The train may sometimes stop short of the platform or shoot beyond it, and the passengers may in consequence have to alight elsewhere than on the platform. Still the purpose always is to bring all the carriages if possible to a level with the platform, and therefore a railway traveller is entitled to expect that when he steps out he will step on the platform. But I agree that if it be daylight—a man being bound to use his eyesight—if the passenger sees that the carriage is not in the ordinary position with reference to the platform, he must not complain if, there being no actual danger, he has to use a little more care than usual in getting out. If the position be such that there is some extraordinary difficulty or danger, he must consider what he will do. He may call to the servants of the company to bring the carriage into its proper position, but there may be circumstances in which it is impossible to make such an application, or he may have no opportunity of making it, or the application may be refused. It is possible that from urgent natural necessity he may be obliged to alight. Under such circumstances as these I am far from saying that he might not have a right of action." . . . .

(c) 24 L. T. 105 (not elsewhere reported). The facts were very similar to those in *Cockle's case*, and the Exchequer Chamber was unanimous for the plaintiff.

After examining the facts in *Prayer's case*, the judgment proceeds :—

“The foregoing case [*Prayer's case*] appears to us in point to the present [*Cockle's case*] as establishing that an invitation to passengers to alight on the stopping of a train, without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence. It is true that in the case before us there was not the invitation to alight, which is implied in the opening of the carriage door, as occurred in *Prayer's case*. But it appears to us that the bringing up of a train to a final standstill, for the purpose of the passengers alighting, amounts to an invitation to alight, at all events after such a time has elapsed that the passenger may reasonably infer that it is intended that he should get out if he purposed to alight at the particular station. It is not necessary here, any more than in *Prayer's case*, to say what would be the effect if a passenger should alight when the danger was visible and apparent; as where a passenger gets out in broad day, trusting to his ability to overcome the difficulty.”

It remains to state the effect of *Siner and Wife v. Great Western R. Co.* (f). *Sturges v. G. W. R. Co.*

The plaintiffs travelled by an excursion train on the defendants' line from West Bromwich to Rhyl, and reached Rhyl in daylight. The engine, with a few front carriages overshot the platform. The plaintiffs were in one of these carriages, and their only way of alighting at the place where their carriage stood was, either by jumping from the iron step to the ground, a distance of about three feet, or stepping from the iron step to a horizontal footboard running along the carriage between the step and the ground, and thence to the ground. The passengers were not told to keep their seats, and the train never in fact backed into the station, nor moved at all until it started for Bangor. No porters were in sight. Several persons got out of the carriage, and the husband then, without any communication with the defendants' servants, and without any request to them to back, himself alighted. His wife, standing on the iron step, took both his hands as he stood below, jumped down and sprained her knee. The jury found for the plaintiff. The Court of Exchequer (g) made absolute a rule to enter a nonsuit, and the Exchequer Chamber (h) affirmed that judgment.

Alighting of passenger without invitation.

Montague Smith, J., observed :—

“In determining such a question as the present, judges cannot denude themselves of that knowledge of the incidents of railway travelling which is common to us all. Now, applying that knowledge to the facts proved, I cannot see any evidence of negligence here. The station was not shown to be improper for ordinary traffic, nor to be badly constructed, nor was the train brought up in a

(f) L. R., 4 Ex. 117; affirming decision below, ib. 3 Exch. 150; distinguished in *Cockle's case*, *ubi supra*.  
(g) Martin, Bramwell and Pigott, BB.,

disse. Kelly, C. B.  
(h) Byles, Mellor, Montague Smith and Hannen, JJ., disse. Keating, J., who tried the case.

*S. Carriage of  
Passengers.*

*Stur v. G. W.  
R. Co.*

Alighting of pas-  
senger without  
invitation.

negligent manner. But the plaintiff, without calling for assistance or desiring the servants of the company to back the train, resolved to alight, and the female plaintiff jumped down with her husband's help. The train could not have backed until a sufficient time had elapsed for the passengers in that part of it which was at the platform to get out, and eventually it became unnecessary to back at all, because it seems that all the passengers in the front carriages, for whose convenience the backing might have taken place, got out at the place where the train was first brought to rest. Were the defendants bound to provide special precautions for these passengers, amongst whom were the plaintiffs? I do not see that they were, or that they were negligent in not doing so."

(C) *Management of Carriage.*

\* Page 594.

Tyre of wheel.

The case of *Redhead v. Midland R. Co.*,\* which has been already noticed, decides that railway companies are not liable for an accident caused by a latent defect in a wheel.

Management of  
door of carriage

A sudden shutting of the door of the carriage by a guard, so as to crush the hand of a passenger, has been held by the Exchequer Chamber to be evidence of negligence on the part of the company (i). This was in a case where it was dark at the time and the passenger had not completely entered the carriage, and had placed the hand that was crushed on the back of the open door to assist him in mounting the step.

And where the plaintiff was thrown by his fellow passengers against the door of an overcrowded carriage, he recovered damages from the company for injury arising from the shutting of the door in the ordinary course (k). But where a passenger, after entering a carriage, left his hand for about half a minute on the door-jamb, and the guard, after crying out to passengers to take their places, shut the door upon the passenger's thumb, it was held that there was no evidence of negligence by the company, and there was evidence of negligence on the part of the passenger (l).

In another case, the door of a train which stopped at frequent intervals flew open thrice, being as often shut by a passenger standing by the door. Attempting to fasten it the passenger fell out, and the company were held not liable (m).

But "the ground on which the judgment in that case was based was, that the plaintiff did something so obviously dangerous, and so obviously without necessity, that the Court were entitled to deal with the matter" (n). Ordinarily a passenger has a right to assume that

Where train  
in motion,  
passenger is  
entitled to  
assume that  
door is shut.

(i) *Fordham v. L. D. & S. C. R. Co.*, L. R., 4 C. P. 619; 38 L. J., C. P. 324. See also *L. & N. W. R. Co. v. Mellowell*, 26 L. T. 557, where the company were held liable for the premature opening of a door.

(k) *Jackson v. Metropolitan R. Co.*, L. R., 10 C. P. 49, and p. 600, ante.

(l) *Richardson v. Metropolitan R. Co.*, 37 L. J., C. P. 176; 18 L. T. 721.

(m) *Adams v. Lancashire and Yorkshire R. Co.*, L. R., 4 C. P. 739; 38 L. J., C. P. 277. See also *Warburton v. Midland R. Co.*, 21 L. T. 835.

(n) Per Brett, J., in *Gee v. Metropolitan R. Co.*, 42 L. J., Q. B. 108.

a door is properly shut, and to act accordingly. Therefore, where a passenger, while the train was in motion, got up to look out of the window, and placed his hand against the bar of the window, whereby the door flew open and he fell out, it was held by the Exchequer Chamber, that the passenger might keep a verdict which he had obtained against the company, as the question whether the omission to fasten the door was the cause of the accident had been rightly left to the jury (o). And, it seems, that the fact of a door being improperly fastened is evidence of negligence on the part of the company, even though the train is not in motion at the time of the happening of an accident (p).

The mere fall of a window from the ledge upon which it rests while closed, into the receptacle it occupies when lowered, is not evidence of negligence which will support an action against the company for injury to a passenger caused by the sudden descent of the window (q).

In calculating the damages, the jury are left very much at large, the proper direction to them being that they are to give not a perfect compensation, but, considering all the circumstances, to give a fair amount as compensation for pecuniary loss and bodily suffering. In estimating the compensation due to a professional man for pecuniary loss, deduction should be made for contingencies, such as loss of health, &c., by reason of which his professional income might have fallen off, but not on the ground of his having a large private income. "Special fees" may be taken into account. Such seems to be the result of *Phillips v. London and South Western R. Co.*, in which the plaintiff was a London physician earning between 6000*l.* and 7000*l.* a year, and having a private income of about 3500*l.* The case was twice fully discussed by the Court of Appeal. On the first occasion (r) the jury having awarded 7000*l.*, the Court granted a new trial for inadequacy of damages. On the subsequent occasion (s) the jury having awarded 16,000*l.*, the Court refused a new trial for excess.

Amount of  
damages re-  
coverable.  
*Phillips v. L. &  
S. W. R. Co.*

### 9. The Liability for Negligence under Lord Campbell's Act.

9. Lord Campbell's Act.

The responsibilities of railway companies as carriers of passengers were greatly extended by Lord Campbell's Act, 9 & 10 Vict. c. 93 (t).

(o) *Gee v. Metropolitan R. Co.*, L. R., 8 Q. B. 161; 42 L. J., Q. B. 105; 23 L. T. 282; 21 W. R. 531.

(p) *Richards v. G. E. R. Co.*, 23 L. T. 711.

(q) *Murray v. Metropolitan District R.*

*Co.*, 27 L. T. 762.

(r) L. R., 5 Q. B. D. 78.

(s) L. R., 5 C. P. D. 280.

(t) See this statute, and its amending act, 27 & 28 Vict. c. 95, post, Vol. II.



9. *Lord Campbell's Act*.

Liability for negligence notwithstanding death of party injured.

Action by executor.

Sect. 1 enacts, that whenever the death of a person is caused by such a wrongful act as would (if death had not ensued) have entitled the party injured to recover damages in respect thereof (*u*), in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, although the death be caused under such circumstances as amount in law to felony (*x*). By sect. 2 every such action is to be for the benefit of the wife, husband (*y*), parent (*z*), and child (*u*) of the deceased person, and brought in the name of his executor or administrator (*b*). Executors are entitled to inspect a report made by a medical man to the company (*c*). Where both husband and wife were killed by the same accident, administration was granted to their respective next-of-kin (*d*). The jury may give such damages as they may think proportioned to the injury resulting from such death to the *parties respectively* for whose benefit the action is brought (*e*). The amount recovered, after deducting costs not recovered from the defendant, is to be divided amongst the before-mentioned parties, in such shares as the jury by their verdict find and direct (*f*). If the company pay an agreed sum to executors without an action being brought, the executors may by action in the Chancery Division, procure a distribution of the sum

(*u*) This has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect or default complained of. *Pym v. A. N. R. Co.*, 32 L. J., Q. B. 378.

(*c*) It may be useful to notice, that by "The Railway Passengers Assurance Company's Act, 1861," 27 & 28 Vict. c. cxxv, s. 35, it is enacted, that no contract of that company nor any compensation received or recoverable by virtue of any such contract, either under that act or otherwise, shall prejudice or affect any right of action, claim or demand, which any person or his executors or administrators may have against any other company or any person, either at common law or by virtue of 9 & 10 Vict. c. 93, or of any other act of Parliament, for the injury, whether fatal or otherwise, in respect of which the compensation is received or recoverable. And see *Boulton v. A. N. R. Co.*, L. R. 10 Ex. 1, and post. As to limitation of liability in case of passengers by "workmen's trains" under certain special acts, see ch. xii ante.

(*q*) *Chapman v. Bullock*, E. B. & F. 188; 27 L. J., Q. B. 315. The statement of claim need not negative the existence of any relations entitled to compensation other than those named.

(*z*) In *Watts v. Mathieson*, 4 Macq. 215, a mother recovered for loss of a son who

supported her. And in *Condon v. Great Southern and Western R. Co.*, 16 Ir. C. L. R. 415, a mother recovered 10*l.* damages for the loss of a son aged fourteen, who earned only 6*l.* a day.

(*u*) "Child" includes a child en ventre sa mère, *The Thompson and Richard*, L. R., 3 Ad. & Ec. 466; 24 L. T. 717; but not an illegitimate child, *Dickinson v. North Eastern R. Co.*, 33 L. J., Ex. 91; *Re Wilson*, 35 L. J., Ch. 213.

(*b*) If there is no executor or administrator, or if no action is brought by him within six months of the death, the action may be brought in the name of the persons beneficially interested. 27 & 28 Vict. c. 45, s. 1, post, Vol. II.

(*c*) *Baker v. L. & S. W. R. Co.*, 37 L. J., Q. B. 53.

(*d*) *Re Wheeler*, 31 L. J., P. M. & A. 40.

(*e*) Therefore the jury must look to the interests of each of these parties, and not take them as a class. *Pym v. A. N. R. Co.*, 32 L. J., Q. B. 377; 2 B. & S. 759. In *Springett v. Bull*, 7 B. & S. 477, a verdict for the plaintiff, damages 40*l.*, 20*l.* to the widow and 10*l.* each to two children, was set aside on the ground that the damages were inadequate.

(*f*) Money may be paid into court in one sum, without specifying the shares into which it is to be divided by the jury. 27 & 28 Vict. c. 95, s. 2, post, Vol. II.

amongst the parties entitled (g). By sect. 3, only one action may be brought, and it must be commenced within 12 months after the death of the deceased person; and by sect. 4, the plaintiff must deliver a full particular of the person or persons on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered (h).

Within 12 months.

The statute gives an action to the representatives of a person killed by negligence, only when, had he survived, he himself, at the common law, could have maintained an action against the person guilty of the alleged negligence (i). Therefore the contributory negligence of the deceased (k), or compensation paid to him in his lifetime (l), are equally an answer to an action by the representatives under the statute.

Representatives have no greater right of action than deceased would have had.

If the deceased has himself sued in respect of the injuries in his lifetime, and has died of the injuries after action brought, the action abates, and fresh proceedings must be taken by the representatives under the statute. It was so decided under sect. 139 of the Common Law Procedure Act of 1852 (m); and Rule 1 of Order XVII. of the Rules of the Supreme Court, 1883, *in pari materid* with that section, prevents the abatement of an action by death "if the cause of action survive or continue" only. In case of death, between verdict and judgment, however, judgment may, by such Rule, be entered, notwithstanding the death and non-survival of the action.

If an action where deceased sued himself in his lifetime.

It has been decided that the jury, in assessing damages under this statute, are confined to injuries of which a *pecuniary estimate* can be made, and cannot take into consideration mental suffering occasioned to survivors by the death of their relative. The Court of Queen's Bench say on this point (n).—

Damages confined to injuries of which pecuniary estimate can be made.

"The important question is, whether the jury, in giving damages, apportioned to the injury resulting from the death of the deceased, to the parties for whose benefit this action is brought, are confined to injuries of which a pecuniary estimate may be made, or may add a *solatium* to those parties, in respect of the mental suffering occasioned by such death. The title of this act may be some guide to its meaning, and it is 'An act for compensating Families of Persons killed by Accident,' not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases the newly-given action may be maintained, although death has ensued; the argument being that the party injured, if he had recovered, would have been entitled to a *solatium*; and, therefore, so shall his representative on his death. But it will be evident

*Blake v. Midland R. Co.*

(g) *Bulmer v. Bulmer*, L. R., 25 Ch. D. 409; 53 L. J., Ch. 402.

(h) *Post*, vol. II.

(i) *Senior v. Ward*, 28 L. J., Q. B. 139; 1 Ell. & Ell. 385; *Hatigh v. Royal Mail Steam Packet Co.*, 52 L. J., Q. B. 640; 49 L. T. 802—O. A.

(k) *Senior v. Ward*, *ubi supra*; *Tucker*

*v. Chaplin*, 2 Cr. & K. 730.

(l) *Read v. A. F. R. Co.*, L. R., 3 Q. B. 555; 37 L. J., Q. B. 278.

(m) *Flinn v. Perkins*, 32 L. J., Q. B. 10.

(n) *Blake v. Midland R. Co.*, 21 L. J., Q. B. 233; 18 Q. B. 91.

9. *Lord Campbell's Act.*

that this act does not transfer this right of action to his representative; but gives to his representative a totally new right of action on different principles. The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family. This language seems more appropriate to a loss of which some estimate may be made, than to an indefinite sum, independent of all pecuniary estimate, to soothe the feelings, and the division of the amount strongly leads to the same conclusion. It seems to us that if the legislature had intended to go the extreme length, of giving, not only compensation for pecuniary loss, but a *solatium* to all the relations enumerated in sect. 5, language more clear and appropriate for this purpose would have been employed. For these reasons we are of opinion, that the learned judge, at the trial, ought more explicitly to have told the jury, that, in assessing the damages, they could not take into their consideration the mental sufferings of the plaintiff for the loss of her husband; and that as the damages certainly exceeded any loss sustained by her, admitting of a pecuniary estimate, they must be considered excessive."

Legal liability not only test.

But legal liability alone is not the test of injury, in respect of which damages may be recovered under Lord Campbell's Act; a reasonable expectation of pecuniary advantage by the relatives remaining alive may be taken into account by the jury, and damages may be given in respect of that expectation if it be disappointed, and the probable pecuniary loss thereby occasioned (o).

Proof of actual damage requisite.

The mere proof, however, of death by negligence will not entitle the executor or administrator to a verdict for nominal damages; there must be some proof of actual damage. Where the deceased, a boy of fourteen, the son of a mason, earned four shillings a week, which was applied by his parents to the general support of the family, and no evidence was given as to whether the sum earned exceeded or was less than the actual cost of maintenance, and the jury gave 20*l.* damages (10*l.* to the father and 10*l.* to the mother), the Court refused to disturb the verdict (p). There must, too, be a reasonable expectation of a benefit arising from the relationship to the deceased of the party for whom the action is brought. Where a father was old and infirm, and a son assisted him in earning wages from motives of filial affection, it was held that the father could recover damages (q); and even where a son was not actually contributing but only had contributed five or six years previously to the maintenance of an infirm father, it was held that there was some evidence for the jury of a reasonable expectation of benefit to the father from the continuance of the son's life (r); but where a son worked for his father at ordinary wages in a trade of which the son had special knowledge, it was held otherwise, inasmuch as there was nothing to show that the son worked for less wages because he

(o) *Franklin v. S. E. R. Co.*, 3 IL. & N. 211; *Dallou v. Same*, 27 L. J., C. P. 227; 4 C. B., N. S. 296; *Pym v. A. N. L. Co.*, infra.

(p) *Duckworth v. Johnson*, 20 L. J., Ex.

25; 4 H. & N. 653. See *Springett v. Balls*, ante, p. 608, note (e).

(q) *Franklin v. S. E. R. Co.*, ubi supra.

(r) *Hilherington v. North Eastern R. Co.*, 51 L. J., Q. B. 495.

was his father's son (s). Where a man and his wife had lived separate for eight years, it was ruled by Lopes, J., that the man had no reasonable expectation of advantage from his wife's chances of coming into 7,000*l.* on the death of her mother, the wife being aged 46 and the mother 80, at the time of action brought by the husband (t).

Funeral expenses are not recoverable under the statute (u).

Funeral expenses.  
Loss of support  
of the mother, &c.  
*L. v. G. N. R. Co.*

It has been held (v) that the loss of the benefit of a superior education, and the enjoyment of greater comforts and conveniences of life is a pecuniary loss, for which the wife and children of the person killed may maintain an action, where the income of the deceased wholly ceases with his death, or where his premature death prevented the deceased from having made the extra provision for his family which he might have been reasonably expected to have made had he lived. In giving judgment, Cockburn, C. J., observed :—

"It is true that it must always remain matter of uncertainty, whether the deceased person would have applied the necessary portion of income in securing to his family the social and domestic advantages of which they are said to have been deprived by his death; still more, whether he would have laid by any and what portion of his income to make provision for them at his death. But as it has been established by the cases decided upon the statute, that if there be a reasonable expectation of pecuniary advantage, the extinction of such expectation by negligence occasioning the death of the party from whom it arose, will sustain the action, it is for a jury to say under all the circumstances, and taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages in such an action."

It had been expressly provided by the special act of the Railway Passengers' Assurance Company that no money paid by that company shall prejudice any right of action, either at common law or under Lord Campbell's Act or any other statute, for the injury in respect of which the money is paid. It is clear that in an action for injuries caused by defendants' negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages (y); and the same principle is applicable to actions under Lord Campbell's Act.

Insurance may not be deducted

In a case where the deceased had covenanted to pay his mother an annuity during their joint lives, Kelly, C. B., admitted the evidence

Calculation of damages

(s) *Sykes v. North Eastern R. Co.*, 11 L. J., C. P. 191; 32 L. T. 199.

(t) *Harrison v. London and North Western R. Co.* 1 C. & E. 519.

(u) *Dillon v. B. E. R. Co.*, 27 L. J., C. P. 227. Nor would such expenses be recoverable in an action for damages to the estate, inasmuch as they must fall upon every estate sooner or later.

(v) *Pyatt v. G. N. R. Co.*, 31 L. J., Q. B. 249; 2 B. & S. 759; 32 L. J., Q. B. 377; 4 B. & S. 396. In this case the jury gave 13,000*l.*, but the Court reduced the amount to 9,000*l.*

(y) *Bradburn v. G. W. R. Co.*, L. R., 10 Ex. 1; 11 L. J., Ex. 9; 31 L. T. 461; 23 W. R. 18.

D. Lord Campbell's Act

Action by executor for damages to estate.  
*Bradshaw v. Lancashire and Yorkshire R. Co.*

Damage to estate.

Double action by executor.  
*Leggott v. G. N. R. Co.*

Appointment of arbitrator by Board of Trade

of an accountant, who proved, by reference to the "Carlisle tables," the average and probable duration of the two lives, and the Exchequer Chamber on a bill of exceptions upheld the ruling (z).

A nice question has arisen as to the right of the executor to sue for damages to the estate of the deceased. In *Bradshaw v. Lancashire and Yorkshire R. Co.* (a), Grove and Donman, JJ., held, that where a passenger on a railway was injured, and after an interval died in consequence, his executrix might recover in an action for breach of contract against the defendants the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business; and the decision of the Exchequer Chamber in *Potter v. Metropolitan R. Co.* (b), that a widow was entitled to recover damages to her husband's estate caused by medical attendance on herself, necessitated by an accident in which both husband and wife were injured, is apparently to the same effect. In *Leggott v. Great Northern R. Co.* (c), however, Mellor and Quain, JJ., questioned the principle of *Bradshaw v. Lancashire, and Yorkshire R. Co.* But that principle has been since approved (d), and is borne out by more than one dictum of an earlier date (e). As was said by Grove, J., in *Bradshaw's case*, it is hard to see "why the damage to the estate, that would be clearly recoverable if the injured party lived, should be the less recoverable because of his death."

Assuming that the action lies, it is not barred by satisfaction recovered in an action by the executor under Lord Campbell's Act, nor does any estoppel arise of which either party can take advantage, as the plaintiff sues in a different capacity. Therefore, where in an action by an administratrix under Lord Campbell's Act, the defendants had pleaded not guilty and that the deceased was not a passenger, which issues were found against them by the jury, the defendants were allowed to set up the same defences to an action by the administratrix for damage to the estate of the deceased (f).

By sect. 25 of the Regulation of Railways Act (31 & 32 Vict. c. 119), the Board of Trade may, upon the joint application of the company and the representatives of the party killed, appoint an arbitrator to determine the compensation (if any) to be paid.

(z) *Rosby v. L. & N. W. R. Co.*, L. R., 8 Ex. 221; 12 L. J., Ex. 153; 29 L. T. 150; 21 W. R. 569.

(a) L. R., 10 C. P. 130; 14 L. J., C. P. 118; 31 L. T. 817.

(b) 32 L. T. 86.

(c) L. R., 1 Q. B. Div. 599; 45 L. J., Q. B. 557; 35 L. T. 834.

(d) In *Pulling v. Great Eastern R. Co.*, L. R., 9 Q. B. D. 110, ante, in which it was held that an administratrix could not

recover in action of tort brought by the intestate in his lifetime.

(e) *Knight v. Quarles*, 2 B. & B. 102; 4 Moore, 532, per Richardson, J.; *Allen v. Midland R. Co.*, 84 L. J., C. P. 292; 12 L. T. 708, per Willes, J.; Williams on Executors, 7th ed. p. 798.

(f) *Leggott v. G. N. R. Co.*, ubi supra; *Barnett v. Lucas*, Ir. R., 5 C. L. 140. But see R. S. C. 1888, Order XVII., "Joinder of Causes of Action."

Lord Campbell's Act (sect. 6) does not apply to Scotland, for the very sufficient reason that by the common law of that country the wife or children of a person killed by negligence, and his parents, if the deceased supported them (but not his brothers or sisters), may by action obtain "assythment," i.e. compensation, from the person guilty of the negligence.

"Assythment  
in Scotland.

### 10. Of Time Tables and Unpunctuality.

Railway companies are under no obligation to issue time tables. And it has been expressly held, that the mere granting of a ticket imposes on a railway company no duty to have a train ready to start at a definite time (y). But in the exercise of their business as carriers, it has long been the universal practice of the companies to issue and publish time tables applicable to their passenger trains, and also for the purposes of through traffic to publish the time tables of other companies. The issue of such time tables amounts to an express contract with the public. Where no time tables are issued, the companies as carriers are under the implied common law obligation to deliver in a reasonable time.†

10. Of Time-  
Tables, and Un-  
punctuality.

It is granting of  
ticket imposes  
no duty to start  
a train at a  
definite time.

\* See p. 540, ante

The cases upon this subject are few, but important. The two leading ones are *Denton v. Great Northern R. Co. (h)*, in which it was held, that the publication of time tables amounts to a contract by the publishing company that not only their own trains but the trains of other companies will run in conformity therewith; and *Le Blunche v. London and North Western R. Co. (i)*, in which it was held by the Court of Appeal that the usual positive promise of a time bill "to pay every attention to ensure punctuality" overrides the usual negative words declining responsibility for delay; but that if the promise be broken, the company is not therefore liable for the costs of a special train taken by the passenger. In *Denton v. Great Northern R. Co.*, the March time tables of the defendants showed a train on their own line from London to Askerne, and a corresponding train on the North Eastern line from Askerne to Hull. This corresponding train had been discontinued to the knowledge of the defendants on and after the 1st March. On the 25th March the plaintiff applied for a ticket from London to Hull by the supposed through train, but the booking clerk refused one, telling him

*Denton v. Great  
Northern R. Co.*  
Publication of  
time tables  
amounts to  
contract, that  
trains will run  
as stated.

(g) *Hurst v. G. W. R. Co.*, 34 L. J., C. P. 264; 19 O. B., N. S. 310.

(h) 5 E. & B. 880; 25 L. J., Q. B. 129.

(i) L. R., 1 C. P. Div. 288; 45 L. J., C. P. 521; 34 L. T. 667, reversing in part

the decision of the Common Pleas Division, which had affirmed that of a county court judge. Special leave to appeal was given under sect. 45 of the Judicature Act, 1873.

10. *(Of Time-Tables, and Un-punctuality.*

that the North Eastern train had ceased running. The plaintiff then took a ticket by the defendant's line from London to Milford Junction, where he had to stay the night, and afterwards sued in the County Court for damages 15*l.* 10*s.*, caused by his "having missed an appointment at Hull." The action was removed by *certiorari*, and the Court of Queen's Bench gave judgment for the plaintiff. Lord Campbell observed, after pointing out the great importance of the case:—

"I think there was a binding contract, and that the case is the same as if the company should publish in express terms that if customers would come to a particular station at a particular hour, a train would be passing at that hour or near the hour, and that any person who tendered his fare should have a ticket and be carried from that station to some other given station. We have here both a promise and a good consideration, and that in law constitutes a contract. Does not the time table amount to such a contract as that? Anyone reading it would understand that the company undertook that, at the particular time, there will be a train passing from Peterborough to Hull, and that any person paying his fare will be carried between those places. There is clearly a prejudice to a person coming to be carried as a passenger. He makes all his arrangements with a view to the promise in the time table being performed. The undertaking by the company seems to me clearly indicated by that which is found on the face of the time table. It is exactly within the principle of the cases referred to, where a reward was offered to any person who will give such information as shall lead to the conviction of an offender. That is a promise made to the public generally, and is the same as if the parties were present. It is a conditional promise, and when the condition has been performed it becomes absolute. There is, therefore, no ground for saying that there was no contract in this case, and there is less ground for saying that there was any excuse for not performing it. It can make no difference that the whole of the line is not the property of the defendants; it is enough that the time table says that the train will run the whole way."

*Le Blanche v. L. & N. W. R. Co.*  
Meaning of contract as to "ensuring punctuality."  
Evidence of breach.  
Damages.

In *Le Blanche v. L. & N. W. R. Co. (k)*, the plaintiff was a passenger from Liverpool to Scarborough, *via* Manchester, Leeds and York. From Manchester to Leeds the train ran over another company's line. From Leeds to Scarborough the journey was over the lines of and by the trains of other companies. The ticket had indorsed upon it the words, "Issued by the London and North-Western Railway Company, subject to the company's regulations, and to the conditions of the time tables of the respective companies over whose lines this ticket is available." The conditions referred to were, amongst others, these:—

"Time Bills. The published train bills of this company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to ensure punct-

tuality as far as it is practicable; but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public, but the company do not hold themselves responsible for any delay, detention or other loss or injury whatsoever arising off their lines or from the acts or defaults of other parties (l), nor for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party (m)."

The time tables showed the following times:—

Leave Liverpool . . . . .	2.0 p.m.
Arrive Leeds . . . . .	5.0
Leave Leeds . . . . .	5.20
Arrive York . . . . .	6.5
Arrive Scarborough . . . . .	7.30

The train was twenty-seven minutes late at Leeds, and the 5.20 p.m. having gone, the plaintiff left Leeds at 5.55 p.m. and reached York at 7.0 p.m., by a train which did not go beyond York. There was a train from York to Scarborough at 8 p.m., timed to arrive at Scarborough at 10.0 p.m. But the plaintiff, although he had no special business at Scarborough, took a special train from York to Scarborough, and arrived at Scarborough between 8.30 and 9.0 p.m. The twenty-seven minutes delay of the defendants was made up of certain unexplained delays at two stations, and would have resulted in an ultimate delay to the plaintiff of two hours and a half, which was reduced by the action of the plaintiff to one hour and a quarter. The Common Pleas Division (Brett, Denman and Lindley, JJ.) was unanimously of opinion that (1) the contract of the defendants was a positive one to make every reasonable effort to ensure punctuality; (2) there was evidence of the contract having been broken; and (3) that there was evidence on which "the County Court judge might not unreasonably find that the plaintiff was not reasonably called upon to wait at York for the late train, and therefore that the County Court judge was justified in law in holding that the plaintiff might charge the defendants with the cost of the special train." The Court of Appeal affirmed the judgment, (1) that the contract was positive, and (2) that it had been broken; but (3) held that the plaintiff was not entitled to take a special train (n).

(l) In *Thompson v. Millant & Co.*, 34 L. T. 34, the plaintiff, who had taken a tourist ticket "subject," &c., was held to be bound by similar words to those in a monthly time-table.

(m) These conditions follow a common

form very generally adopted by railway companies.

(n) A new trial was ordered unless the plaintiff would consent to a reduction of the damages to 1s. The plaintiff consented to this course.



10. Of Time-  
Tables and Un-  
punctuality.

*Le Blanche v. L.  
& N. W. R. Co.*  
Evidence  
of breach of  
contract as  
to "ensuring  
punctuality."

In giving judgment, James, L.J., observed :—

"The company are not entitled to strike out from the contract the words 'But every attention will be given to ensure punctuality so far as it is practicable,' and to treat this as a mere vague assurance having no legal operation, involving no legal responsibility, but only a responsibility to public opinion to be enforced by letters to the 'Times' or a local journal. I agree, however, that it is to be read in connection with the very clear stipulations that the company are not to be accountable for any loss, inconvenience or injury which may arise from delays or detention. It appears to me that the whole sentence is capable of a reasonable and consistent legal operation. The contract is to be read as if it were a contract made with regard to that particular train on that particular day, just as if somebody else not the company had made for that day arrangements enabling them to take passengers from Liverpool to Scarborough. The company might reasonably stipulate that it would not be answerable for any delay occasioned by anything on the line, any block at a station, any breakdown of any other train or any of the innumerable accidents which do occur and must occur constantly on every line of traffic. But, at the same time, it might well promise and undertake that so far as regarded that particular train or that particular journey every attention would be given to ensure punctuality.

"If we consider the immense extent and complication of a modern railway system and network in England, it would be most unreasonable to put a construction on such a document as the one before us, which would enable any passenger delayed anywhere to put the whole traffic arrangements, and the conduct of the whole railway staff, on its trial before a judge or jury. It is quite possible, and not improbable, that the negligence or blunder of officials in London or at Carlisle, of the guard of a goods train, a pointsman or signaller, might derange the traffic so as to cause a block or delay on a branch line hundreds of miles away. And to my mind it is not to be endured that for such a negligence as that the company is to be liable to every passenger everywhere delayed by it.

"Again, it appears to me that the company must be at liberty to accept any traffic brought to it, a special train for the Queen or a royal visitor, to accept an army of volunteers or excursionists, although it thereby disabled itself later in the day from keeping the times mentioned in its time tables. But if we read the contract *reddendo singula singulis* as applicable and limited to each particular train for each particular journey, then we can reasonably construe the statement in the conditions as a promise that the persons having the control and management of that train for that journey will pay every reasonable attention, as far as it is practicable for them, to ensure punctuality, viz., that they will not be guilty of wilful delay or reckless loitering. I am of opinion that there was some evidence before the County Court judge to justify a conclusion that there was such wilful delay. In the time tables a margin of fifteen minutes was allowed at Manchester. Now, according to the regulations, every person minded and entitled to go on from Manchester by that train ought to have been with his luggage on the platform ready to start at 3.20; and it does appear to me, as it did to the County Court judge, that if proper attention had been then and there paid to ensure punctuality, the passengers getting out at Manchester would have been immediately got out and the passengers getting in would have been got in without a minute's delay, and if this had been done the further delays between Manchester and Leeds would in all probability have been avoided; for we all know that the want of punctuality of a train in the early part of its journey is

almost invariably followed by disarrangements and further delays in the further prosecution of its journey. But I am not satisfied that in dealing with that question of fact,—viz., whether there was a breach of the contract,—the County Court judge rightly construed the contract, or rightly apprehended what would be a breach of it. I am not satisfied that he put the question to himself in this way: Were the persons having the control and management and conduct of the train on that day guilty of wilful delay or reckless loitering?

“With respect to the remaining question,—whether the plaintiff was entitled to take the special train,—I certainly should not myself have arrived at the same conclusion as the County Court judge. I agree that the general rule is, that a person with whom a contract has been broken has a right to fulfil that contract for himself as nearly as may be, but he must not do this unreasonably or oppressively as regards the other party, or extravagantly. I should myself have held it most unreasonable and oppressive for the plaintiff to have taken a special train merely to get in an hour earlier at the terminus of his journey on the seaside. And I think it must be taken that the County Court judge did consider the dictum of Mr. Baron Alderson as establishing it as a rule of law, that the plaintiff was, and that every other passenger for Scarborough by that train would have been, entitled to save himself the discomfort and annui of an hour's detention at York by taking a special train for Scarborough.”

Damages

Mellish, L.J., concurred, observing, as to the construction of the time bill, that the language of the conditions was the language of the company, and that they were seeking to put a construction on the conditions, the effect of which would be to free them from a liability which the law unquestionably, in the absence of an express agreement to the contrary, imposed on them, namely, a liability to be answerable for the negligence of their servants; and as to the breach of contract, that the fact of the train being a quarter of an hour late at Manchester made it necessary for the defendants to give some explanation of the cause of the delay. As to the damages, the learned judge observed:—

“I agree that, as a general rule, what is said by Alderson, B., in *Hamlin v. Great Northern R. Co.* (o), is correct, namely: ‘The principle is that, if the party does not perform his contract, the other may do so for him as near as may be, and charge him for the expense incurred in so doing.’ I agree also with what is said by the judges of the Common Pleas Division, that this rule is not an absolute one, applicable to all cases, and that the question must always be whether what was done was a reasonable thing to do, having regard to all the circumstances. This, however, is a very vague rule, and it is desirable to consider whether any more definite rule can be laid down. Now, one mode of determining what, under the circumstances, was reasonable, is to consider whether the expenditure was one which any person in the position of the plaintiff would have been likely to incur if he had missed the train through his own fault, and not through the fault of the railway company. The rule, that what is reasonable under particular circumstances may be discovered by considering what a prudent person uninsured would do under the same circumstances,

Measure of damages.

10. *Of Time  
Tables, and Un-  
punctuality.*

Expense of spe-  
cial train.

is applicable to many cases besides those which arise under policies of marine insurance.

"I think that any expenditure which, according to the ordinary habits of society, a person who is delayed in his journey would naturally incur at his own cost, if he had no company to look to, he ought to be allowed to incur at the cost of the company, if he has been delayed through a breach of contract on the part of the company; but that it is unreasonable to allow a passenger to put the company to an expense to which he could not think of putting himself, if he had no company to look to. The question then, in my opinion, which the County Court judge ought to have considered is, whether, according to the ordinary habits of society, a gentleman in the position of the plaintiff, who was going to Scarborough for the purpose of amusement, and who missed his train at York, would take a special train from York to Scarborough at his own cost, in order that he might arrive at Scarborough an hour or an hour and a half sooner than he would if he waited at York for the next ordinary train. This question seems to me to admit of but one answer, namely, that no one but a very exceptionally extravagant person would think of taking a special train under such circumstances."

With regard to the first point of this important case, it is to be observed, that it is quite legitimate for railway companies to contract themselves out of their ordinary liability to passengers for the negligence of their servants. This much seems to follow from *McCarley v. Furness R. Co.* (p). Time tables, therefore, containing no such positive words as those which have now received judicial construction will, if brought to the notice of the passenger, exempt the companies from responsibility for delay, and the only question will be, whether they were brought to the notice of the passenger or not (q). As to the second point, it will be observed that the principal delay—of fifteen minutes at Manchester, on the company's own line—was unexplained, and it was chiefly from this absence of explanation that the Court decided against the company. It is plain that exact punctuality is frequently impossible, and it is presumed that credible evidence might easily have been forthcoming. It will be a question of fact, whether all reasonable efforts to ensure punctuality have been made, and it will often be a hard task to decide between conflicting claims of public safety and public convenience. As to the expense of a special train, the question of measure of damages is nominally left open by the recent judgment; but it would be hard to lay down a more satisfactory rule than that of Mellish, L.J. above set forth. It is quite clear that a company are not bound to forward by special train a passenger failing to catch a train on their own line by reason of a train timed to meet it being delayed if the delay arose from no fault of the company (r).

*Le Blanche v. L.  
and N. W. R. Co.*

special train

(p) L. R. 8 Q. B. 57. The 7th section of the Traffic Act of 1854, p. 564, ante, applies only to goods, including passengers' luggage, and animals.

(q) As to this point, see the cases cited at p. 591, ante.

(r) *Fitze, and v. Midland R. Co.*, 24 L. T. 771.

Personal inconvenience may no doubt be a subject of damage. In a case where the train of the defendants took the plaintiff, with his wife and two children, in another direction than that indicated by their time tables, it was held that the plaintiff might keep a verdict for 8*l.* in respect of having to walk five miles home at midnight, but that damages awarded in respect of the illness of his wife arising from the walk were too remote (s).

Personal inconvenience.

Where the plaintiff travelled by excursion train from Barnsley to London, "to return by the trains advertised for that purpose on any day not beyond fourteen days after date" thereof, and not being able to find room in one of the ordinary trains from London to Barnsley, came as far as the intermediate station of Doncaster, from which no trains ran to Barnsley, he recovered his posting expenses from Doncaster to Barnsley (t).

Posting expenses.

It seems that no damages can be recovered in respect of a failure to keep business engagements (u). But a person having a business appointment to keep might take a special train to enable him to keep it, and charge the expense upon the company, if he would take a special train in a case where he had no company to look to (r).

Failure to keep business engagements.

Hotel expenses would in ordinary cases be recoverable, so long as the incurring them was the natural consequence of the company's negligent delay. But where the plaintiff spent three days at an hotel waiting for a parcel delayed by the company's negligence, it was held that he was not entitled to recover hotel expenses (y).

Hotel expenses.

A Select Committee in 1858 recommended that passengers should be enabled to recover from the companies summary penalties for unpunctuality. With reference to this proposal, the Royal Commission of 1867 observed :—

Suggestions as to summary penalties for unpunctuality.

"If a railway company be bound under a penalty always to keep time, it must provide in its time bills for a certain amount of overtime to guard against exceptional cases; and it would thus materially reduce the speed which it now endeavours to give, so long as the passenger is content to bear the contingency of delay. If, however, great expedition were required of the companies, the efforts of the officers of the companies to maintain punctuality in exceptional cases would enhance the risk of railway travelling; and it would require a protection like that on the French lines by the regulations as to booking, with or without luggage, and placing the passengers under control for a certain time before departure. If the same speed as is now shown on time tables were to be guaranteed, the companies would be obliged to provide means for running a

(s) *Hobbs v. L. & S. W. R. Co.*, L. R., 10 Q. B. 111; 44 L. J., Q. B. 49.

(t) *Hawcroft v. G. N. R. Co.*, 21 L. J., Q. B. 178; 16 Jur. 106.

(u) *Hamlin v. G. N. R. Co.*, 28 L. J., Ex. 20.

(v) *Le Blanche v. L. & N. W. R. Co.*,

per Mellish, L. J., ubi supra. And see *Duckmaster v. G. E. R. Co.*, 29 L. T. 471 per Martin, B.

(y) *Woodger v. G. W. R. Co.*, L. R., 2 C. P. 318. And see *Hutley v. Bezzant*, 9 Ex. 311, p. 550, ante.

10. *Of Time  
Tables, and Un-  
punctuality.*

much greater speed on occasions. Hence, guaranteed punctuality means either increased expense of working, which must be paid for by increased fares, or diminished average speed in the trains."

11. *Through  
Traffic and Sea  
Traffic.*

Liability for  
negligence of  
another company  
in case of  
running powers.

11. *Of Through Traffic and Sea Traffic.*

The contract into which a railway company enters with a passenger on giving him a ticket between two places is the same whether the journey be entirely over their own line or partly over the line of another company, whether the passage over the other line be under an agreement to share profits (z), or simply under running powers (a). And the law is the same with respect to the carriage of goods (b).

*Wright v. Mid-  
land R. Co.*  
Contract of com-  
pany extends  
only to persons  
connected with  
carrying pas-  
senger.

But the rule is not of universal application so far as passengers are concerned. The contract with the passenger is only that all persons connected with the carrying of the passenger, and the means and appliances thereof, shall use due care, and does not extend further. This was decided by the Court of Exchequer in *Wright v. Midland R. Co.* (c). There the plaintiff contracted with the defendants to be carried from Leeds to Sheffield on their own line. The London and North Western R. Co. had, by a special act, running powers over a portion of that line (with which a junction was formed about four hundred yards from the defendants' station at Leeds) on payment of a mileage toll. The signals at the point of junction were under the control of the defendants. Owing to the servants of the London and North Western Company negligently disobeying these signals, a train of that company ran into the train by which the defendants were carrying the plaintiff, and injured him. The Court was unanimous against the plaintiff. Bramwell, B., after pointing out that the act which did the damage was solely that of the London and North Western R. Co., observes:—

"Why, under these circumstances, should the defendants be liable? If this had been the case of goods they would have been liable, because they are then insurers; but here the duty of the defendants, according to the decided cases, is this: they enter into a contract that all persons connected with the carrying, and with the means and appliances of the carrying, with the carriages, the road, the signalling, and otherwise shall use care and diligence, so that no accident shall happen. But they contract no farther. If they were to contract that everybody should use care and diligence, their duty would extend to

(z) *G. W. R. Co. v. Blake*, 31 L. J., Ex. 346, Ex. Ch.

(a) *Thomas v. Rhymney R. Co.*, L. R., 6 Q. B. 286, Ex. Ch.; 39 L. J., Q. B. 141.

(b) *Muschamp v. Lancaster & Preston*

*R. Co.*, 8 M. & W. 421; *Bristol & Exeter R. Co. v. Collins*, 29 L. J., Ex. 51; 7 Il. L. C. 194.

(c) L. R., 8 Ex. 137; 42 L. J., Ex. 89.

strangers. But it is conceded that they have no such duty as that. They have no contract or duty that strangers to the railway (if one may use such an expression) shall do nothing wrong either by wilfulness or negligence, but it is said that they have a sort of intermediate obligation which is more than that all who are engaged in the carrying shall use care and diligence, but less than that all mankind shall use care and diligence, and not be guilty of wrong; a sort of obligation that all persons who have occasion and who lawfully may use the line shall not be guilty of any negligence or misconduct. Where is the authority for that proposition? In reason and upon principle how is it justified at all? It is said to be a very convenient thing that the plaintiff should be able to sue those undertaking to carry him, and should not be driven to inquire who it was that injured him, and bring his action against that person. But that is really an argument that it is very convenient to be unjust. Why there should be some duty extending beyond all those engaged in the carrying, and yet not including all mankind, I cannot see either in reason or upon principle.

“Now one word about the authorities. The first case quoted was *Great Western R. Co. v. Blake* (d). That decision appears to me to have proceeded upon the grounds particularly expressed in the judgments of Cockburn, C. J., and Crompton, J., from which I gather that the Court considered that the defendants undertook to carry the plaintiff over the South Wales Railway, and therefore they undertook that the South Wales Railway Company's lines should be in a fit condition for the conveyance of the plaintiff. I will not say that I see nothing unreasonable in that, but I see nothing so unreasonable in it as, at all events, the proposition of the plaintiff upon the present occasion would be. This seems to me a plausible way of putting the case: ‘You have undertaken to take me to this place; I care not by what means you do it. You are going to take me by a certain railway, belonging partly to yourselves and partly to others. On your own railway you would be bound to take due and reasonable care that it shall be in a fit and proper condition to convey me, so therefore you ought to undertake that the other railway over which you carry me shall be, and of which I know nothing at all.’ I say I think that is a plausible proposition, and I will not cavil at it. It is decided, and one ought not, without one is satisfied that the opinion expressed is wrong, to say that it is so. The South Wales Railway was not, in fact, in a fit condition for the carriage of the plaintiff because somebody who was the servant of the South Wales Railway Company, had put a carriage there and the South Wales Company's servants had left it there. Therefore, if the servants had undertaken that the whole line should be in a fit condition, their contract had not been performed. Similar reasoning will apply to the case of *Thomas v. Rhymney R. Co.* (e); and more especially when it is remembered that in that case the departure of the defendants' train from the Taff Vale station depended upon certain information which they could get there, which information was to be given to them for their guidance, and for want of which information the accident happened. Therefore it may well be said that there was neglect in certain persons whom the Rhymney Company employed, to give them notice whether their train should go on or not. And although the case was not one of master and servant, it may well be that the Taff Vale porter and the station officials were the agents of the Rhymney Company in such a sense as to make the defendants responsible for their misdeeds. At all events, if these persons did nothing, which was the case when they did not tell the defendants they ought to go on, the defendants were in this situa-

(d) 7 H. & N. 987; 31 L. J., Ex. 346. (e) L. R., 6 Q. B. 266, and p. 620, ante.

11. *Through Traffic and Sea Traffic.*

*Wright v. Midland R. Co.*

Contract of company extends only to persons connected with carrying passenger.

tion—that nobody had done that which ought to have been done before they started on their forward journey. It seems to me, therefore, that those two cases prove nothing more than what I have said, namely, that if in the carrying of the passenger, including therein road, engines, carriages, signalling and so on, there shall be any negligence from which damage may accrue to the passenger, the company are liable. But here there is nothing of the sort. This act of the North Western Company is not negligence which related to the plaintiff being carried at all: it was done while he was being carried, it is true, but it had nothing to do with his being carried. It was done by the North Western Company, for their own purposes, in a matter not connected with the carrying of the plaintiff. It was not a negligent act which made the road unsafe, nor the carriage or engine unsafe, or the signals wrong, but done outside of the carrying (if I may use the expression), and which caused damage to the plaintiff while he was being carried. It is admitted, that if the London and North Western Company had been trespassers, this action would not be maintainable; but it is said that, because they had a right to be there, there is some obligation on the part of the defendants with relation to them which makes the defendants liable. Now I think there is such an obligation, but only to this extent, that the defendants are bound to use due and reasonable care that the London and North Western Railway shall not run into them, and shall do nothing to make the road or the defendants' carriages unsafe. But the defendants did their duty in this, for they signalled to the London and North Western train not to come on; and I think if the defendants' engine driver could have seen that the London and North Western train was coming on, and could have stopped before coming into collision with it, he ought to have done so."

Liability of company other than that from whom ticket taken.

*Foulkes v. Metropolitan District R. Co.*

In addition to the liability incurred by the company issuing the ticket for a through journey, there is a liability attaching to the company actually carrying a passenger, founded on tort or contract, or both. This was held by the Court of Appeal in *Foulkes v. Metropolitan District R. Co. (f)*, in which the plaintiff took a ticket at Richmond from the London and South Western Railway Company, and was carried to Hammersmith by the defendants under running powers. In this case the whole journey appears to have been conducted by the defendants, who did everything but make the contract and provide the station of departure. The principle would seem to be the same if the actually contracting company had actually carried for a part of the journey however long.

"Foreign" truck.

Identification of carriage inspector with engine driver. *The Bernina.*

A railway company has been held not to be liable for damage caused by a foreign truck attached to one of its own trains (g).

*Armstrong v. Lancashire and Yorkshire R. Co. (h)*, in which it was held that the carriage inspector of the London and North Western Railway Company, travelling on the defendants' line by a free pass under running powers, was so far identified with an engine-driver of

(f) *Foulkes v. Metropolitan District R. Co.*, L. R. 5 C. P. D. 157, C. A. aff. L. R., 4 C. P. D. 287.

(g) *Richardson v. G. E. R. Co.*, L. R., 1 C. P. Div. 342.

(h) *Armstrong v. Lancashire & Yorkshire R. Co.*, L. R., 10 Ex. 47; following *Thorogood v. Bryam*, 8 C. B. 115, with approval.

his own line that he would not recover for the joint negligence of such engine-driver and the servants of the defendants, has been overruled by the House of Lords (i), and is no longer law.

The common condition in a cattle ticket, that a drover travelling free shall travel at his own risk, applies to the whole of a through journey, and exempts from liability for negligence not only the contracting but the forwarding company. This was held in *Hull v. North Eastern R. Co.* (k). There a drover with sheep took a ticket from the North British Railway Co. from Angerton to Newcastle. The ticket exonerated the company "from all injury or loss to the drover, however occasioned, on the journey for which it was issued or used," but made no mention of any other than the North British Railway Co., with whom the contract was made. The North British line goes no further than Morpeth, from which place the drover and the sheep were carried on in the same trucks attached to a train of the North Eastern Railway Co., the two companies having traffic arrangements of a character which did not appear. Blackburn, J., observed :—

Free pass to drover at his own risk exemption forwarding as well as contracting company.

"The two questions are—first, how far the terms of this ticket protect the North British Company; and secondly, whether it cures to protect the North Eastern Company. As to the first question, I think the terms of the ticket did protect the North British Company from the consequences of a collision with another train of that company; that, I think, was one of the risks which the plaintiff took upon himself. It is very much like the contract as between master and servant, in which the servant undertakes all the ordinary risks of the service, including risk of being injured by the negligence of other servants in the same employ. On the second question, the defendants, the North Eastern Railway, received the plaintiff as sub-contractors, and so took him on to Newcastle. There was no negligence connected with the train in which the plaintiff was, but the collision took place owing to the negligence of the defendants' servants managing the other train, and if the contract had been with the North Eastern they would have been clearly protected. Now there can be no doubt that the North British Company handed over the plaintiff as a passenger to be carried on by the North Eastern Company to Newcastle. They had not running powers over the line, but they handed him over to the North Eastern Company under what are called traffic arrangements. When the plaintiff went to the North British Company, and took a ticket, under which he was to be carried from Angerton to Newcastle, he, in effect, agreed that the North British Company should secure that the North Eastern Company should carry him on from Morpeth to Newcastle; and when he engaged to travel at his own risk he engaged with the North British Company that they should agree with the North Eastern Company that he should be carried on to Newcastle exactly on the same terms as if the North British line extended to Newcastle. It is clear that this is the true construction of the ticket: 'In consideration of my being carried the whole way free of charge, I agree that I shall be travelling the whole way at my own risk;' and

(i) *The Bernina*, 58 L. T. 423, affirming the Court of Appeal, 12 P. D. 50.

(k) L. R., 10 Q. B. 137; 44 L. J., Q. B. 164; 33 L. T. 306.



11. *Through Traffic and Sea Traffic.*

it seems to me that the plaintiff did authorize the North British Company to contract for him with the North Eastern Company, and what he authorized was that he should travel at his own risk. Mr. Herschell put his argument on a rather special ground, that 'the company' is the term used throughout, and that this must be confined to the North British Company, and that it amounts to saying 'as far as the North British Company is concerned I am travelling at my own risk.' I cannot think that any such argument can be sustained from the terms used, which are on a general form applicable to all journeys. In fact, in most cases where a passenger takes a ticket from one place to another, he does not know where one line ends and another line begins. I think it must be taken that the plaintiff intended the terms on which he travelled to be communicated to the North Eastern Company, and that he must be taken to have assented that the ticket should protect the North Eastern Company just as much as the North British, and that the terms of this ticket extended to all risks connected with the journey which the plaintiff might meet with as a passenger."

Limitation of liability by special contract

*Zurrs v. S. E. R. Co.*

Meaning of "off own line"

*Kent v. M. R. Co.*

It is frequently the practice of companies to limit their liability by special contract that they will not be answerable for delay or injury arising "off their own lines." Such contracts are quite legal, and are not within the restriction imposed by the 7th section of the Railway and Canal Traffic Act, 1854 (*l*). The meaning of the condition that a company will not be responsible for loss arising off its own lines, when applied to luggage, is not merely "off the lines of railway," but "off the station or any part of the premises which may be called part of the line;" and to bring themselves within such a condition a railway company must show that the luggage when lost was out of their custody. This is the effect of a case where luggage was removed from a Midland train across the Birmingham station in the direction of a platform from which a North Western train was to start, the Birmingham station being owned by the North Western, but the Midland Company, who had contracted to carry the plaintiff from Bath to Chester, having the use of the stations and the service of the porters under a working agreement (*m*).

Sea traffic.

Another kind of through traffic is where railway companies, either as owners of steam-vessels themselves or under agreements made with the owners, contract to carry passengers or goods beyond the seas (*n*).

Carriers Act does not apply to carriage by water.

We have already seen that the Carriers Act does not apply to carriage by water (*o*). But where there is a contract to carry partly by land and partly by water, the contract is divisible, and the

(7) *Zurrs v. S. E. R. Co.*, L. R., 4 Q. B. 539, and p. 568, ante. In this case the company was held protected by the condition, printed on a ticket from London to Paris, in respect of the loss of a portmanteau between Calais and Paris. See also *Thompson v. Midland R. Co.*, 34 L. T. 84.

(m) *Kent v. Midland R. Co.*, L. R., 10

Q. B. 1; 44 L. J., Q. B. 18. As to notice of condition to passenger, see p. 591, ante.

(n) As to evidence of the authority of a steam company's agent to book cattle for a railway company, see *McCourt v. L. & N. W. R. Co.*, 1r. R., 3 C. L. 107, 462, Ex. Ch.

(o) *Le Couiteur v. L. & S. W. R. Co.*, L. R., 1 Q. B. 54, and p. 574, ante.

Carriers Act is a protection where the loss happens during the land carriage (*p*). On the same principle, where there is a contract to carry partly by land and partly by water, the Merchant Shipping Acts apply to such part of the carriage as is by water, and a railway company has the full benefit of the limitation of liability imposed by those acts, to the amount of 15*l.* per ton on the tonnage of the ship. For it was held in *L. & S. W. R. Co. v. James* (*q*), that where a ship owned by a railway company comes into collision with another ship and sinks, causing both loss of life and goods, actions are not maintainable by surviving passengers for loss of luggage, by shippers of goods for loss of goods, or by the representatives of lost passengers for damages.

Limitation of  
liability by Mer-  
chant Shipping  
Act.  
*L. & S. W. R. Co.  
v. James.*

The statutory limitation is fixed by sect. 54 of the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), as follow :—

“The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,—

- (1) Where any loss of life or personal injury is caused to any person being carried in such ship ;
- (2) Where any damage or loss is caused to any goods, merchandise or other things whatever on board any such ship ;
- (3) Where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person carried in any other ship or boat ;
- (4) Where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise or other things whatsoever on board any other ship or boat ;

be answerable in damages in respect of loss of life or personal injury either alone or together with loss or damage to ships, boats, goods, merchandise or other things to an aggregate amount exceeding 15*l.* for each ton of their ship's tonnage, nor in respect of loss or damage to ships, goods, merchandise or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage ; such tonnage to be the registered tonnage in the case of sailing ships, and, in the case of steamships, the gross tonnage, without deduction on account of engine room.”

It seems, too, from *L. & S. W. R. Co. v. James*, that where there are numerous claims against railway companies owning ships, these claims cannot be prosecuted as of right before a jury by individual actions brought by the several parties grieved, but are subject to the operation of the 514th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which gives the shipowner the power to apply to the Chancery Division of the High Court (*r*), to determine the amount of his liability and to distribute such amount rateably amongst the several claimants. The section is as follows :—

“In cases where any liability has been, or is alleged to have been, incurred by any owner [of a ship] in respect of loss of life, personal injury, or loss of or

(*p*) *Ibid.*

(*q*) *L. R.*, 8 Ch. 241 ; 42 *L. J.*, Ch. 337.

(*r*) See Judicature Act, 1873, s. 34, by

which the statutory jurisdiction of the Court of Chancery is transferred to the Chancery Division.

12. *Damage by Sparks from Engines.*

12. *Liability of Railway Companies for Damage caused by Sparks or noise of Engines.*

*Vaughan v. Taff Vale R. Co.*  
Company not liable in the absence of negligence.

It was held in an early case, that a railway company authorized by statute to use locomotive engines are not indictable for nuisance if their engines frighten the horses (c) of persons travelling along a highway running parallel to the line (c). This is because the Legislature, in authorizing the use of the engine, must have intended to legalize its ordinary use. On the same principle it was afterwards decided by the Exchequer Chamber, in *Vaughan v. Taff Vale R. Co.* (d), that railway companies, in the absence of negligence, are not liable for damage done to fields adjoining their lines by sparks thrown by engines. The plaintiff in that case was the owner of a wood adjoining the embankment of the railway. Eight acres of the wood were burnt by a fire originating from a spark or coal from one of the defendants' engines in the ordinary course of its working. On the part of the defendants everything practicable had been done to make the engine safe—a cap had been put to the chimney, the ashpan had been secured, and the engine was travelling at the slowest pace consistent with practical utility. In giving judgment for the defendants, Cockburn, C. J., observed :—

“ I collect from the reasoning given by Bramwell, B., in delivering the judgment of the Court of Exchequer, that their view is, first, that whereas accidents occasionally arise from the use of fire in propelling locomotive engines, the occurrence of accidents must be taken to be a natural and necessary incident to the use of fire for the purpose of locomotion ; and, secondly, that a railway company who use fire for that purpose will be liable for any accident that may result from its use, although they may have taken all possible known precautions to prevent injury, and though there is no proof of negligence, except so far as negligence is implied in the use of fire for the purpose mentioned. I cannot adopt that view. It is at variance with the principles adopted by the Court in *R. v. Pease* [ubi sup.], the authority of which case this Court is prepared to recognize and act upon. Though it be true, generally, that a person who keeps an animal of known dangerous propensities, or uses an instrument from which some manifest danger may arise, may be responsible for an injury occasioned by such animal or instrument without proof of negligence ; yet, when the Legislature has sanctioned the use of a particular means for a given purpose, it appears to me that that sanction carries with it this consequence, that the use of the means itself for that purpose (provided every precaution which the nature of the case suggests has been observed) is not an act for which an action lies independent of negligence. This is consistent with *R. v. Pease*, and the rules of sound policy.”

(c) *R. v. Pease*, 4 H. & Ad. 30. But it has been held to be actionable negligence to blow off steam at a level crossing. *Manchester South Junction R. Co. v. Furlarton*, 14 C. B., N. S. 54.

(d) 29 L. J., Ex. 247 ; 5 H. & N. 679,

reversing decision below, 28 L. J., Ex. 41 ; 8 H. & N. 743 ; affirmed by House of Lords in *Hammermill and City R. Co. v. Brand*, L. R., 4 H. L. 171, and p. 281, ante.

Blackburn, J., added,—

"No doubt there was some evidence of negligence on the part of the defendants, for the fact of the sparks coming from the locomotive unexplained would be evidence of negligence. But here the case finds that it is to be taken as a fact that the defendants had taken all the precautions that science could suggest to prevent their engines from emitting sparks. There is no breach of duty in the mere using the engine."

But the statutory authority to use engines must be express, otherwise the company will, in all events, be liable for damage caused thereby (e).

The companies, however, are clearly liable in the case of negligence, and it seems that the fact of premises being fired by sparks emitted from a passing engine is *prima facie* evidence of negligence on the part of the company, rendering it incumbent on them to show that some precaution had been adopted by them, reasonably calculated to prevent such accidents. Moreover, evidence is admissible for the purpose of showing that other engines belonging to the company upon other occasions, in passing along the line, have thrown sparks or ignited matter to a sufficient distance to reach the building in question, without showing the precise circumstances under which this occurred (f).

Evidence of negligence.

Where fire from a passing engine ignited heaps of dry grass left by the company's workmen near the line, and the conflagration spread across a road to the plaintiff's house, about two hundred yards from the line, it was held by the Exchequer Chamber that this was evidence of negligence, although there was no suggestion that the engine was improperly constructed or driven (g).

And in an earlier case (h) it was held, in an action against a railway company for negligence, by the emission of sparks from a locomotive, whereby the plaintiff's wheat-rick was burnt, that a learned judge at nisi prius was right, who, after telling the jury that the evidence for the company was extremely powerful to show that the engine was of the best known construction, but that the evidence of the plaintiff's witnesses was, that, in their opinion, the risk of causing mischief by sparks from the engine was not improbable, and that the engine was so constructed as to be dangerous without a precaution of some kind, left it to the jury to decide whether they believed either the plaintiff's or the defendant's witnesses on this point; and also left it to the jury to consider whether each set of

*Freemantle v. L. & N. W. R. Co.*

(e) *Jones v. Festiniog R. Co.*, L. R., 3 Q. B. 733; 37 L. J., (1) B. 214.

(f) *Piggott v. Eastern Counties R. Co.*, 3 Q. B. 229; 10 Jur. 571; and see *Attridge v. W. R. Co.*, 3 M. & G. 515.

678; affirming decision below, L. R., 5 C. P. 98.

(h) *Freemantle v. L. & N. W. R. Co.*, 31 L. J., C. P. 12; 10 C. B., N. S. 59. See also *Longman v. Grand Junction Canal*.

12. *Damage by  
Sparks or noise  
of Engines.*

witnesses might not have been mistaken in the degree of excellence or of defect imputed to the engine; and if so, said that it was still for the jury to decide either for the company, if no further precautions could with reason be required; or for the plaintiff, if they were in reason requisite.

Result of cases.

The result of the above cases is, that the company will be liable for damages caused by fire arising from sparks from their locomotives, unless they adopt all reasonable precautions to prevent such accidents. Whether or not they have done so is a question for the jury, to be decided upon the evidence. It would seem, too, that the company may give evidence of contributory negligence, as that the season was dry and the plaintiff allowed materials unusually combustible to lie upon his land (i).

Blowing off  
steam at level  
crossings.

Where a railway crossed a highway on the level, it was held to be clearly actionable negligence in the driver to blow off steam just at the level crossing, whereby the horses of the plaintiff, whose carriage was just about to drive over the crossing, took fright and injured themselves, a county court judge, whose judgment was appealed against, having found that the defendants had not used reasonable care in the management of the engine (k). But where injury resulted from a horse being frightened by the sight and sound of an engine blowing off steam at a station, it was held by the Court of Appeal that the railway company owning the station were not liable, although the jury had found that they were guilty of negligence in not screening the railway from the roadway leading to the station, and that such negligence had caused the accident, it not appearing that the engine had been used in an improper manner (l). In connection with this case, attention should be directed to s. 63 of the Railways Clauses Act, 1845 (ante, p. 417, and post, vol. II.), whereby if the surveyor of any highway apprehend danger to the passengers on the road, in consequence of horses being frightened by the sight of engines on a railway, he may apply to the Board of Trade, who may require the railway company to screen the highway.

Blowing off  
steam at station.

(i) See per Tindal, C. J., in *Aldridge v. Great Western R. Co.*, 8 M. & G. 519. In America this question has been decided in favour of the companies. See *Ross v. Boston and Worcester Railroad Company*, 6 Allen's Rep. 87 (Supreme Court, Massachusetts). And see the recent American cases collected in a judgment of Agnew, C. J., in the Supreme Court of Pennsylvania, in *Hendrickson v. Philadelphia and Reading R. Co.* (Law Journal, July 29th, 1876, p. 451), where it said that "the conclusion from the cases is very clear, that a plaintiff is not responsible for the mere condition of his premises lying along a railroad; but in order

to be held (sic) for contributory negligence, must have done some act or omitted some duty which is the proximate cause of his injury concurring with the negligence of the company." But "in America, the rule of the liability of railways for damage by fire communicated by their engines is more favourable to the companies than in England." Redfield on Railways, i. 454.

(k) *Manchester South Junction, &c. R. Co. v. Fullarton*, 14 C. B., N. S. 54. And see further as to negligence at level crossings, ante, p. 383.

(l) *Simkin v. L. & N. W. R. Co.*, L. R., 21 Q. B. D. 453, C.A., affirming Charles, J., and Huddleston. B

## CHAPTER XVII.

THE LIABILITY OF RAILWAY COMPANIES AS MASTERS TO AND FOR  
THEIR SERVANTS.

1. <i>Liability to Servants at Common Law</i> . . . . .	PAGE 631	2. <i>The Employers' Liability Act</i> . . . . .	PAGE 633
		3. <i>Liability for Acts of Servants</i> . . . . .	PAGE 637

1. *Liability of Railway Companies to their Servants at Common Law.*1. *Injuries to Servants (Common Law).*

THE common law rule is, that a master is not liable to his servant for injuries occasioned by defective machinery or the dangerous nature of his premises, unless the master knows or ought to know of the defect or danger, and the servant does not or ought not (a), the servant not being bound to risk life or limb in the service of his master, and being able to decline to perform any service in which he reasonably apprehends injury to himself (b). Where a guard, whose duty it was to attach carriages to an engine, was injured by an accident occasioned by his not having another person to assist him, it was held that no action lay against the company in whose service he was, because he voluntarily undertook the risk of the situation (c).

The rule first laid down in 1837 in *Priestly v. Fowler* (d) that a master is not liable to his servant for the negligence of a fellow-servant, unless the master has employed unskillful servants, appears to have been first applied to railway service in *Hutchinson v. The York, Newcastle and Berwick R. Co.* (e). There the declaration alleged that the plaintiff was in the employ of the defendants, and was injured by a collision while riding in a train of the defendants. The plea was that both trains were managed by servants of the defendants, and a demurrer to that plea was unanimously overruled on the ground that the collision was a risk which the plaintiff must be taken to have agreed to have run when he entered into the defendants' service. And it was observed in the considered judgment of the Court, that "whether the death resulted from mis-

Liability for acts of fellow-servant.

(a) *Priestly v. Fowler*, 3 M. & W. 1. 9 Exch. 223; 23 L. J., Ex. 23.  
 (b) *Priestly v. Fowler*, per Lord (d) 3 M. & W. 1.  
 Abinger, C. B. (e) 5 Exch. 313; 19 L. J., Ex. 296.  
 (c) *Skip v. Eastern Counties R. Co.*

1. *Injuries to  
Servants  
(Common Law).*

*Morgan v. Vale  
of Neath R. Co.*

Servants cannot  
recover in respect  
of negligence of  
fellow-servant.

management of the one train or the other, or of both, did not affect the principle."

Another important case on this subject is *Morgan v. Vale of Neath R. Co.* (f), which, though it lay down no new principle, shows how far the Courts were inclined to go in the application of the old one. There the plaintiff was employed as a carpenter to paint an engine shed, near which was a turntable. The servants of the company in negligently turning a carriage upon the turntable knocked down a ladder which supported a plank on which the plaintiff was standing, whereby the plaintiff was injured. It was held by the Courts of Queen's Bench and Exchequer Chamber, that the plaintiff was not entitled to recover.

Blackburn, J., in delivering judgment in the Queen's Bench, said:—

"A servant who engages for the performance of services for compensation, takes upon himself, as an implied part of the contract, as between himself and his master, the natural risks and perils incident to the performance of such services; the presumption of law being that compensation was adjusted accordingly, or, in other words, that those risks are considered in the wages; and that where the nature of the service is such that, as a natural incident to such service, the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the servant, by his contract, takes upon himself as between him and his master, and consequently that he cannot recover against his master for an injury so caused. . . . If the master has, by his own personal negligence or misfeasance, enhanced the risk to which the servant is exposed, beyond those natural risks of the employment which must be presumed to have been in contemplation when the employment was accepted, as, for instance, by knowingly employing incompetent servants, or defective machinery or the like, no defence founded on this principle can apply, for the servant does not, as an implied part of the contract, take upon himself any other risks than those naturally incident to the employment."

What is "com-  
mon employ-  
ment."

Foreman a  
fellow-servant.  
*Wilson v. Merry.*

The term "common employment," therefore, was very comprehensively used, and it was held to include the service of a guard and the ganger of platelayers (y), of a labourer employed in loading trucks with ballast and a deputy foreman of platelayers (h), and of a person employed to pick up stones on the line and an engine-driver (i); and the decision of the House of Lords in *Wilson v. Merry* (k) settled conclusively that a foreman was a fellow-servant with the servants whom he superintended.

(f) L. R., 1 Q. B. 145; 35 L. J., Q. B. 23, affirming decision below, 33 L. J., Q. B. 260.

(g) *Waller v. S. E. R. Co.*, 32 L. J., Ex. 205.

(h) *Lovegrove v. L. B. & S. C. R. Co.*, 33 L. J., C. P. 329.

(i) *Tunney v. Midland R. Co.*, L. R., 1 C. P. 291.

(k) L. R., 1 Sc. & D. App. 826. See also *Feltham v. England*, L. R., 2 Q. B. 83; and *Degg v. Midland R. Co.* (volunteer), 26 L. J., Ex. 171; 1 H. & N. 773; *Wright v. L. & N. W. R. Co.* (volunteering consignee), L. R., 10 Q. B. 298, aff. L. R., 1 Q. B. Div. 252; *Swainson v. North Eastern R. Co.* (Joint Station staff), L. R., 8 Ex. D. 341—C. A.

The defence of contributory negligence on the part of the workman is open to the defendant (*l*), but is not necessarily proved by the mere fact that the workman knew the work to be dangerous (*m*).

Contributory negligence.

It is also a defence that the workman knew of any particular defect, although he may give notice of it, and voluntarily undertook the risk resulting from it (*n*), but it has been said that proof must be given of knowledge, not only of the particular defect, but of the particular risk (*o*), and that the rule *volenti non fit injuria*, as applied in *Thomas v. Quartermaine*, does not apply where the injury arises from the breach of a statutory duty by the employer (*p*).

Knowledge of workman,  
*Thomas v. Quartermaine*.

## 2. *Liability of Railway Companies to their Servants under the Employers' Liability Act.*

2. *The Employers' Liability Act, 1850.*

The common law liability of masters to their servants has been greatly extended by the Employers' Liability Act, 1850, 43 & 44 Vict. c. 42 (see vol. II.), in respect of injuries arising from the negligence of a fellow servant, by greatly lessening in number the kinds of employment which are to be considered "common" within the rule that one servant cannot recover for the negligence of another in a "common employment." It is important to observe at the outset, however, that the old rule is altered, not abolished, so that unless an injured servant can bring himself within the terms of the statute he must still fail to recover.

By the 1st and 2nd sections of this statute, a railway servant, unless he knew of the defect or negligence which caused his injury, and did not give information of it, or knew that his employer or a superior was aware of it, has the same right of compensation as if he had not been in the service of the employer for personal injury caused, as specified in the five sub-sections of the 1st section, either—

- (1) By defect in the condition of the ways, works, machinery [which term includes unsuitable machinery (*q*)], or plant [which term includes a vicious horse (*r*)], arising from or not remedied by the negligence of the employer, or some person to whom the supervision of the machinery is entrusted [*i.e.*, defect showing negligence in the employer or some person, &c. (*rr*)]:

(*l*) *Webb v. Bullard*, L. R., 17 Q. B. D. 122.

(*m*) *Ib.*

(*n*) *Thomas v. Quartermaine*, L. R., 18 Q. B. D. 686; 57 L. T. 537—C. A.; Lord Esher, M. R., diss.

(*o*) *Farnmouth v. France*, L. R., 19 Q. B. D. 677.

(*p*) *Buddley v. Earl Granville*, L. R., 19 Q. B. D. 423.

(*q*) *Hicks v. Samuelson*, L. R., 12 Q. B. D. 30; 49 L. T. 471.

(*r*) *Farnmouth v. France*, L. R., 19 Q. B. D. 647.

(*rr*) *Walsh v. Whitley*, L. R., 21 Q. B. D. 371, C. A., diss. Lord Esher, M. R., who



2. *The Employers' Liability Act, 1880.*

- (2) By the negligence of any person [although voluntarily assisting in manual labour (s)] in the service of the employer, having the sole or principal duty of superintendence (t), and not ordinarily engaged in manual labour :
- (3) By the negligence "of any person in the service of the employer, to whose orders or directions the workman at the time of the injury was bound to conform (u), and did conform, where such injury resulted from his having so conformed :"
- (4) By the act or omission of any person in the service of the employer in obedience to bye-laws, not being bye-laws sanctioned by a Government Department under the authority of Parliament, if the injury resulted from some impropriety therein :
- (5) "BY REASON of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway."

Of these sub-sections, the 1st alters the law only in the enactment that the master is to be liable for the negligence of the person to whom the supervision was entrusted.

The 2nd and 3rd sub-sections do not seem to require any special comment.

With regard to the 4th sub-section, it is conceived, for the reasons already pointed out (ante, p. 419), that the powers of the Board of Trade over bye-laws under the Railways Clauses Act, 1845, and 3 & 4 Vict. c. 97, do not apply to bye-laws affecting railway servants. Section 35 of the Explosives Act, 1875 (x), however, which directs railway companies to make bye-laws as to the carriage of explosives, prescribes also that such bye-laws shall apply to the servants of the company making them.

Whether there was "impropriety" in any particular bye-laws would seem to be a question of fact, not of law.

Sub-sect. 5.

The 5th sub-section is the one of principal importance to the owners of railways, fixing them as it does with a liability extending not only beyond their liability at common law, but beyond the liability of any other employer under the statute itself. A "train" would seem to be within the sub-section, whether being hauled by a

Train.

was of opinion that the defect contemplated by the Act is "not a defect with reference to the purpose for which the machine is employed, but a defect with reference to the safety of the workmen using it."

(s) *Osborne v. Jackson*, L. R., 11 Q. B. D. 619 ; 48 L. T. 642 (rule for new trial discharged).

(t) See *Shaffens v. General Steam Navigation Co.*, L. R., 10 Q. B. D. 356 ; 52 L. J., Q. B. 280 (nonsuit upheld).

(u) See *Bunker v. Midland R. Co.*, 47 L. T. 476 ; 31 W. R. 281 (nonsuit upheld).

(x) 38 Vict. c. 17, post, vol. II.

locomotive or not (y), and the word railway would seem to include any railway by whomsoever owned (z), but perhaps not a tramway properly so called, i.e., a line of rails laid down on a road, over which the owner of the tramway has an easement only. "Railway."

A steam crane fixed on a trolley, and propelled by steam along rails, is not a locomotive engine (u). "Locomotive engine."

A workman employed to clean, oil, and adjust points, worked by other men from a signal box, has been held not to be in "charge or control" of them (b). "Charge or control of points."

The 1st section gives a right of action, "in case the injury results in death," to "the legal personal representatives of the workman," and to "any persons entitled in case of death." Lord Campbell's Act, 9 & 10 Vict. c. 93 (ante, p. 607), gives an action to the personal representatives only for the benefit of the wife, husband, parent or child of the deceased person, and the amending Act, 27 & 28 Vict. c. 95, allows such relatives only to sue in default of the executor. Action by representatives of deceased servant.

Upon the mere words of the 1st section of the Employers' Liability Act above stated, a more extensive right of action is given to the personal representatives, their right of action not being expressly confined to cases where the deceased leaves the relatives mentioned in Lord Campbell's Act or some or one of them, him surviving; but it is conceived that the limitation of Lord Campbell's Act is to be read into the Employers' Liability Act.

The 3rd section limits the amount of compensation recoverable to three years' average earnings of a person in the same grade with the injured person. Limitation of amount recoverable.

The 4th section bars the action "unless notice" (which notice, looking to the 7th section, must be in writing (e)) "that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death;" but it is also provided "that in case of death the want of such notice shall be no bar to the maintenance of such action if the judges shall be of opinion that there was reasonable excuse for want of such notice." Notice.  
Limitation of time

(y) *Cox v. Great Western R. Co.*, L. R., 9 Q. B. 11, 107; 30 W. R. 816. In this case a "capstan man" propelled a set of trucks, the capstan being set in motion by hydraulic power communicated to it by the man from a stationary engine.

(z) *Doughty v. Firbank*, L. R., 10 Q. B. D. 358; 52 L. J., Q. B. 480; 48 L. T. 530. In this case the word was held to include a temporary railway laid down by a railway contractor for the purpose of constructing the railway works.

(a) *Murphy v. Wilson*, 52 L. J., Q. B. 524; 48 L. T. 788.

(b) *Hibbs v. G. W. R. Co.*, L. R., 12 Q. B. D. 208 (C. A.); 49 L. T. 610.

(c) *Moyle v. Jenkins*, L. R., 8 Q. B. D. 116; 51 L. J., Q. B. 112; 30 W. R. 324; *Keen v. Millwall Dock Co.*, L. R., 8 Q. B. D. 183; 51 L. J., Q. B. 277; 46 L. T. 472—C. A. In this case Lord Coleridge, C. J., intimated that the notice must be in some single writing; but Brett and Holker, L.JJ., were not prepared to go so far: and it is submitted that a liberal construction ought to be given to s. 7, so as to allow an insufficient notice to be supplemented by a second written one.

2. *The Employers' Liability Act, 1880.*

The 5th section, which provides for the deduction, from the compensation awarded, of any fine paid to the workman under an Act of Parliament, is conceived to have no application to railway companies as such. The reference is to s. 82 of the Factory and Workshop Act, 1878, 41 Vict. c. 16.

Action must be in County Court.

The 6th section prescribes that every action under the Act must be brought in a county court; "but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may be removed."

Removal of action to High Court.

The removal of a county court action into the High Court by certiorari is regulated, on the commencement of the County Courts Act, 1888, 51 & 52 Vict. c. 43 (*i.e.*, on or after January 1, 1889), by s. 126 of that Act (replacing s. 90 of the County Court Act, 1846, and s. 38 of the County Court Act, 1856), as follows:—

"It shall be lawful for the High Court or a judge thereof to order the removal into the High Court, by writ of certiorari or otherwise, of any action or matter commenced in the Court under the provisions of this Act, if the High Court or a judge thereof shall deem it desirable that the action or matter shall be tried in the High Court, and upon such terms as to payment of costs, giving security, or otherwise, as the High Court or a judge thereof shall think fit to impose."

Notices.

The 7th section regulates the form and service of the notice in respect of an injury required by s. 4, prescribing that the notice must state the name and address of the person injured, and the cause and date of the injury, but it is also expressly provided that "a notice shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading," and three cases (*d*) have arisen in which notices which were technically defective have been upheld under this proviso. By the same section:—

"Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at, or by sending it by post in a registered letter, addressed to the office, or if there be more than one office, any one of the offices of such body."

"Contracting out of the act."  
*Gilfilla v. Earl Dudley.*

It is clear that a servant may "contract himself out" of the benefit of the act, and that an agreement by a servant not to claim compensation under the act is not contrary to public policy, and that in event of the death of the servant from an injury mentioned in the

(*d*) *Stone v. Hyde*, L. R., 9 Q. B. D. 76; 51 L. J., Q. B. 76 (nonsuit set aside); *Clarkson v. Musgrave*, L. R., 9 Q. B. D. 386; 51 L. J., Q. B. 525 (rule for new trial discharged); *Carter v. Drysdale* (date omitted), 32 W. R. 171. The pro-

viso seems to have been framed with the intention of giving a wide discretion to the judge at the trial, and perhaps has the legal effect of shutting out the appeal, so long as the notice was a written one.

agreement, his representatives cannot claim under the act. So it was held in *Griffiths v. Earl of Dudley* (e), in which case there was a clear consideration for the contract by reason of the defendant contributing to the funds of a benefit society, out of which allowances were paid in case of injuries to workmen, a sum equal to the aggregate of the contributions of the workmen. It is conceivable, however, that although there must be a consideration in every case for the servant contracting himself out of the act, the mere employment is a legal consideration, but that a mere continuing to employ would not be. The "contract out," therefore, if made *after* the contract of employment, would be void if made without consideration, unless it should be made by deed. In any case the "contract out" may be either written or unwritten.

The Act of 1880 is temporary only. It was by s. 10 limited to expire on the 31st December, 1887. The Expiring Laws Continuance Act of 1887 continued it until the 31st December, 1888, but the Expiring Laws Continuance Act, 1888, makes no mention of it, so that, unless specially continued, it will expire at the end of 1888. A Government Bill to take the place of the expiring Act, passed through the Law Standing Committee of the House of Commons just before the August adjournment of the session of 1888. Its further progress in the present session is doubtful, as a deputation of working men has informed the Home Secretary that they preferred the Act of 1880 to the Bill as at present framed.

Act of 1880  
temporary only.

Should any Bill pass before the close of 1888 (and it is presumed that at least a Continuance Bill will), it will be printed amongst the statutes in vol. II. of this work.

### 3. *Liability of Railway Company for Acts of their Servants.*

Ordinarily no question arises as to the authority of the servants of a railway company. There is a class of cases, however, in which this question always arises, and that is where an action is brought against a railway company for an assault by one of their servants committed in prevention of a supposed breach of the bye-laws of the company, or other act supposed to militate against the interests of the company. The rule is that which applies to ordinary cases of master and servant,—that if the servant is acting in the course of his employment, or in obedience to a direct order, or if the act of the servant be ratified, the company will be liable, otherwise not.

#### 3. *Liability of Company for Acts of Servants.*

—Company responsible only for servant acting in the course of his employment.  
*Goff v. G. N. R. & A.*

(e) L. R., 9 Q. B. D. 357; 51 L. J., Q. B. 543; 47 L. T. 10; 30 W. R. 797.

8. Liability of  
Company for Acts  
of Servants.

The leading case is *Goff v. Great Northern R. Co.* (f). There the plaintiff took a return ticket from London to Wood Green and back. On returning to London he gave to the ticket collector an old half-ticket by mistake. The ticket collector, with the approval of the "superintendent of the line," referred the matter to the police inspector and a constable, both in the pay of the defendants, and by them the plaintiff was taken before a magistrate, and charged with travelling without having paid his fare, and with intent to avoid payment of it. The magistrate dismissed the charge. It was held that the company were liable, in an action for false imprisonment, for the act of the "superintendent of the line." The Court observed:—

"Up to a certain point, there is no doubt about the law. A railway company, though it be a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by the authority of the company; and it is not necessary that the authority should be under seal. Both these points were decided by the Court of Exchequer in *The Eastern Counties R. Co. v. Broom* (g). But it lies upon the plaintiff to give evidence justifying the jury in finding that the persons actually imprisoning him, or some of them, had authority from the company so to do. In *The Eastern Counties R. Co. v. Broom*, the Court of Exchequer Chamber were of opinion that what was stated in the bill of exceptions in that case was not sufficient evidence for that purpose; and it has been argued before us that the evidence in the present case goes no further. It has also been argued that, in *Roe v. The Birkenhead, Lancashire and Cheshire Junction R. Co.* (h), the Court of Exchequer entered a nonsuit in a case in which the evidence, it is said, was similar to that in the present case; and that these decisions, one in a court of error, and the other in a court of co-ordinate jurisdiction, are binding upon us. But both these decisions took place in 1851; and in 1853 the Court of Exchequer Chamber, in *Giles v. The Taff Vale R. Co.* (i), stated principles which are also binding upon us; and which, it was said for the plaintiff, and we think correctly, are applicable to the present case. The question there was, whether there was evidence sufficient to prove a conversion of certain quicks belonging to the plaintiff by the Taff Vale Railway Company, the defendants in that action. The evidence stated in the bill of exceptions showed that the quicks had been brought in two parcels to two different stations belonging to the defendants, and that when demanded from the clerks there, reference was made to one Fisher, who was called 'the general superintendent of the line,' and he refused to deliver them up. Nothing was stated in the bill of exceptions to show what the authority of a 'general superintendent' was. There being no doubt that Fisher was guilty of a conversion, the question was whether there was sufficient evidence of his authority from the company to make them liable. Jervis, C. J., Pollock, C. B., Alderson, B., Maule, J., Platt, B., Williams, J., and Talfourd, J., all agreed that there was sufficient evidence. Jervis, C. J., put it upon a broad and intelligible principle. He said, 'I am of opinion that it is the duty of a company carrying on a business to have upon the spot some one in authority to deal on behalf

(f) 8 E. & E. 672; 80 L. J., Q. B. 148.

(g) 6 Exch. 314.

(h) 7 Exch. 36; 21 L. J., Ex. 9.

(i) 2 E. & B. 822; 23 L. J., Q. B. 43.

of the company with all cases arising in the course of their traffic as the exigency of the case may demand; and I think it was a question for the jury whether Fisher in this case was a person having such authority.' . . . . .

"The question in that case arose as to the evidence of authority to deal with goods, and the language of the different judges being with reference to that subject, they speak only of the exigencies of traffic or of the business of a carrier of goods; but the same principle is, we think, applicable to all exigencies that may be naturally expected to arise in the ordinary course of any of the business of the company. If these are of such a nature that a decision must be come to on behalf of the company promptly, the company may reasonably be expected to authorize some one on the spot to decide for them in such cases. Now in the present case, the railway company carry on a business a great part of which consists in carrying passengers for money. By statute 8 Vict. c. 20, ss. 103, 104, a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to avoid payment thereof; and power is given to all officers and servants on behalf of the company to apprehend such person until he can conveniently be taken before a justice. In the ordinary course of affairs the company must decide whether they will submit to what they believe to be an imposition or use this summary power for their protection; and as from the nature of the case the decision whether a particular passenger shall be arrested or not must be made without delay, and as the case may not be of infrequent occurrence, we think it a reasonable inference that in the conduct of their business the company should have on the spot officers with authority to determine, without the delay attending on convening the directors, whether the servants of the company shall or shall not on the company's behalf apprehend a person accused of this offence. We think that the company would have a right to blame those officers if they did not on their behalf apprehend the person if it seemed a fit case; and, if so, the company must be answerable if, in the exercise of their discretion, those officers on their behalf apprehend an innocent person.'

Upon the principles laid down in this well-considered case, which have never been deviated from, a railway company has been held liable to an action for false imprisonment in respect of an inspector of a station giving a passenger into custody for refusing to produce his ticket (k), and to an action for assault by one of their porters for pulling a passenger out of a carriage under the impression that the passenger had got into the wrong train (l).

False imprisonment.

A station master has no implied authority to bind the company to pay for surgical attendance on an injured passenger (m), but a "general manager" has (n), and so has a "sub-inspector of police," charged with the duty of repairing to the scene of an accident in his district (o). A night inspector has no implied authority to

Contract to pay for surgical attendance.

(k) *Moore v. Metropolitan R. Co.*, L. R., 8 Q. B. 36.

(l) *Bayley v. M. S. & L. R. Co.*, L. R., 8 C. P. 148; 42 L. J., C. P. 78; 28 L. T. 366, affirming decision below, L. R., 7 C. P. 415. In *Glover v. L. and S. W. R. Co.*, L. R., 8 Q. B. 25, the plaintiff, on being taken into custody, left a race-glass in the carriage, and it was held that he could

not recover the value of it from the company.

(m) *Cor v. Midland Counties R. Co.*, 3 Exch. 268.

(n) *G. W. R. Co. v. Willis*, 34 L. J., C. P. 195.

(o) *Largan v. G. W. R. Co.*, 30 L. T. 173, Ex. Ch.

8. *Liability of  
Company for Acts  
of Servants.*

Booking and  
delivery of  
goods.

False imprison-  
ment.

Malicious pro-  
secution.

Libel.

answer questions as to delivery of goods (*p*). But a booking clerk booking cattle out of their proper order, when it was not known to the consignor that the clerk was acting without authority, has been held to render the company liable for delay caused by disobedience to his instructions (*q*). If the instructions of the company had been known to the plaintiff it would have been otherwise (*r*). But a head porter (even in the absence of the station master) (*s*) has no authority to give a person into custody on suspicion of stealing the company's property from the station yard (*s*), nor has a booking clerk authority to arrest a passenger on a suspicion of an attempt to rob the till under his charge (*t*). Nor are the company liable for an assault committed by one of their constables in wrongfully giving the plaintiff into custody for an assault upon one of the company's servants (*u*). But where a booking clerk charged the plaintiff with stealing a ticket, and the plaintiff was searched by the station-master, the Exchequer Chamber in Ireland held the company liable for the acts of these officials (*x*).

A railway company is not liable for a malicious prosecution instituted by one of their servants without their knowledge or direction (*y*), but the employment of policemen by a railway company to protect their property is an act within the incorporation of the company (*z*). It has, however, been said by Lord Bramwell (*a*) and by Alderson, B. (*b*), that an action for malicious prosecution does not lie against a railway company or other corporation aggregate, though authorities to the contrary are not wanting (*c*).

A railway company may be sued for libel (*d*).

No servant of the company can be taken to be authorized by the company to do that which the company would not have been justified in authorizing (*e*).

(*p*) *G. W. R. Co. v. Willis*, 34 L. J., C. P. 195.

(*q*) *Page v. G. N. R. Co.*, Ir. R., 2 C. L. 228.

(*r*) See *Slim v. G. N. R. Co.*, 14 C. B. 647, where it was held that the defendants were not responsible for non-delivery of live stock left at the station without an acknowledgment from the proper officer of their receipt.

(*s*) *Edwards v. L. & N. W. R. Co.*, L. R., 5 C. P. 445; 39 L. J., C. P. 241.

(*t*) *Allen v. L. & S. W. R. Co.*, L. R., 6 Q. B. 65; 40 L. J., Q. B. 55.

(*u*) *Walker v. S. E. R. Co.*, L. R., 5 C. P. 940; 39 L. J., C. P. 346.

(*x*) *Van den Eynde v. Ulster R. Co.*, Ir. R., 5 C. L. 328.

(*y*) *Stevens v. Midland R. Co.*, 10 Exch.

352.

(*z*) *Edwards v. Midland R. Co.*, L. R., 6 Q. B. D. 287.

(*a*) In *Abrath v. North-Eastern R. Co.*, L. R., 11 App. Cas. 247; 55 L. J., Q. B. 457.

(*b*) In *Stevens v. Midland R. Co.*, *supra*.

(*c*) See *Green v. London General Omnibus Co.*, 7 C. B., N. S. 290; *Kelly v. Mid. G. W. R. Co.*, Ir. R., 7 C. L. 8; and per Fry, J., in *Edwards v. Midland R. Co.*, *supra*.

(*d*) *Whitfield v. South Eastern R. Co.*, E. B. & E. 115. They may also sue, *Metropolitan Omnibus Co. v. Hawkins*, 4 H. & N. 87.

(*e*) *Poulton v. L. & S. W. R. Co.*, L. R., 2 Q. B. 534; 36 L. J., Q. B. 294.

## CHAPTER XVIII.

ON THE ASSESSMENT OF RAILWAYS TO THE POOR'S RATE, AND  
TO LOCAL AND DISTRICT RATES.

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## 1. The Principles of Railway Rating.

1. Principles  
of Railway  
Rating.

IT is well known that railway companies are rateable to the relief of the poor; but many difficulties have always been experienced in carrying the law into effect. The difficulties in arriving at the amount of the rate (which is for quarter sessions) must always continue; the difficulties in fixing the principles of rating have been gradually cleared up by successive decisions, with the exception of the difficulty connected with the rating of branch lines, which is still unsettled.

Railway companies are liable to be rated to the poor's rate, as being occupiers of land, within 43 Eliz. c. 2, s. 1, which enacts, that competent sums shall be levied in each parish for the relief of the poor, by "taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, appropriations of tithes, coal mines, or saleable underwoods in the parish," to be gathered out of the parish, according to the ability of the parish.

Companies  
rateable as  
occupiers of  
land.

And the Parochial Assessment Act, 1836 (*u*), enacts, sect. 1:—

Parochial  
Assessment Act.

"That no rate for the relief of the poor in England and Wales shall be allowed by any justices (*b*), or be of any force, which shall not be made upon an estimate

(*a*) 6 & 7 Will. 4, c. 96. See also the Union Assessment Committee Act, 1802 (25 & 26 Vict. c. 103), s. 15; and the Union Assessment Committee Act, 1804, 27 & 28 Vict. c. 39.

(*b*) The allowance of a rate by justices is a mere *ministerial*, and not a *judicial*, act. *R. v. Earl of Yarborough*, 12 A. & E. 416. But a rate without it is *void*. *Bar v. Davies*, 8 C. B. 11.



1. *Principles  
of Railway  
Rating.*

of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates (c) and taxes, and tithe commutation rent charge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses (if any) necessary to maintain them in a state to command such rent: *provided always*, that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities (if any) according to which different kinds of hereditaments are now by law rateable."

Exemption of  
stock-in-trade.  
3 & 4 Vict. c. 89.

And, by 3 & 4 Vict. c. 89, s. 1 (d), it is enacted that—

"It shall not be lawful for the overseers of any parish, township or village to tax any inhabitant thereof, as such inhabitant, in respect of his ability derived from the profits of stock-in-trade or any other property, for or towards the relief of the poor."

Transmission of  
accounts to over-  
seers.  
R. C. Act, s. 107.

Railway companies are bound, under penalty, to prepare annual accounts of their receipts and expenditure, and, *if required*, to transmit copies of such accounts to the overseers of the several parishes through which the railway passes (e); and by sect. 5 of the Union Assessment Committee Amendment Act, 1864, 27 & 28 Vict. c. 39, within fourteen days after the transmission to an Assessment Committee of any valuation list, the committee must give notice to every railway company named in the list as the occupier of any property included therein, and not having any office or place of business in the parish to which the list relates, of the sum set down as the rateable value of the property occupied by the company,—which notice may be sent by post to a principal office of the company.

Obligation to  
make up defi-  
ciency in assess-  
ments to poor  
rate caused by  
construction of  
railway.

L. C. Act, s. 133.

While a railway is in the course of construction, the company, if possessed of lands liable to be assessed to the poor rate, are liable, from time to time and until the completion and assessment of the works, to make good the deficiency in the assessments caused by the taking of the lands; and such deficiency (which is payable on demand) must be computed according to the rental at which the lands, with buildings thereon, were rated at the time of the passing of the special act (f). Such is the effect of an important provision in the Lands Clauses Act, 1845, which, according to the decision of the House of Lords in *East London R. Co. v. Whitechurch* (g), upon a similar clause in a special act, has a purely parochial application, and ceases to operate, *quod* a particular parish, so soon as the line is completed

*First London R.  
Co. v. White-  
church.*

(c) In metropolitan parishes, the general rate and lighting rate, levied under 18 & 19 Vict. c. 120, s. 161, are tenants' rates, and are to be deducted. *R. v. Goodchild*, 27 L. J., M. C. 233; E. D. & E. 1; and see *ibid.* as to tenants' profits.

(d) Continued by Successive Expiring Laws Continuance Acts, and lastly by the

Expiring Laws Continuance Act, 1888, 51 & 52 Vict. c. 38, until the 31st December, 1889.

(e) R. C. Act, 1845, s. 107.

(f) L. C. Act, 1845, s. 133.

(g) L. R., 7 H. L. 81; 43 L. J., M. C. 169; 30 L. T. 412; reversing the judgment of the Exchequer Chamber, L. R., 7 Ex. 424, and restoring that of the Exchequer,

and worked within that parish, however far from completion other portions of the line may be. The deficiency which is to be made up includes any deficiency in respect of amounts raised for borough rate under s. 145 of the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, or for county rate under 15 & 16 Vict. c. 81, s. 26 (*h*).

Borough and  
County Rate.

These are the statutory provisions now in force. It may also be taken to be a well-established principle, that a railway is rateable in the parish where the profits are *earned*; and it makes no difference that the earnings are received elsewhere; just as a farmer is rateable in the place where he grows his corn, not where he sells it (*i*). It therefore makes no difference that a portion of the fares and tolls which are earned in any parish are received at any other place.

Railway rateable  
where profits  
earned.

And it is the amount of the traffic over the portion of the railway in each *parish*, taken in connection with the proper deduction, which must regulate the amount of the rate. If the portion in a parish is more productive than other portions in other parishes, either because there is more traffic, or because the yearly outgoings and expenses there are less, it ought to be assessed at a higher proportionate value (*k*): as "the value which the land occupied in each parish produces, after the due allowance, is that upon which the occupier is to be rated in each" (*l*). This is called the parochial principle, in contradistinction to the mileage principle, which incorrectly assumes that the property must be equal throughout the whole line of a railway.

Parochial  
principle.

Another principle of the law is, that the amount of the assessment to the rate does *not* depend upon the amount of the *capital originally expended* in constructing the portion of the railway which is the subject of the assessment (*m*); except, indeed, so far as such expenditure has increased the annual value of that portion of the railway; for instance, the tunnel at Box Hill, on the Great Western Railway, or the portion of the L. & N. W. Railway constructed across Chat Moss, must be rated with reference, not to its original cost, but with reference to the amount of its yearly earnings and outgoings, in the same proportion as any other parts of the railway less costly in their construction.

Prime cost  
immaterial

It therefore appears, 1st, that railway companies are liable to be rated as being occupiers of land; 2ndly, that the company must be

L. R., 7 Ex. 248; and overruling *Reg. v. Metropolitan District R. Co.*, L. R., 6 Q. B. 698. The clause of the special act in question merely differed from the Act of 1845 in applying to sewers rate and other rates in addition to the poor rate. See also *Stratton v. Metropolitan Board of Works*, L. R., 10 C. P. 76.  
(*k*) *Farmer v. L. & N. W. R. Co.*, L. R., 20 Q. B. D. 788.

(*i*) *R. v. Inhabitants of Burnes*, 1 B. & Ad. at p. 116, per Parker, J.

(*k*) *R. v. Inhabitants of Kingswinford*, 7 B. & C. 212; *R. v. L. & N. W. R. Co.*

(*l*) *R. v. L. B. & S. C. R. Co.*, 20 L. J., M. C. 121.

(*m*) *R. v. Mile End Old Town*, 10 Q. B. 208; 10 L. J., M. C. 131. And see *R. v. North Staffordshire R. Co.*, 30 L. J., M. C. 69.

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assessed upon an estimate of the net annual value of the hereditaments, *i.e.* the land on which the railway is constructed; 3rdly, that they are not liable to be assessed in respect of their ability derived from stock-in-trade, or any other property, except land; 4thly, that the rate must be upon the parochial, and not upon the mileage principle; and, lastly, that the cost of the railway and works in the particular parish cannot be taken as an estimate on which to found the rate.

These principles of law appear to be clear and distinct enough; but in their practical application great difficulties have been experienced. They seem to arise chiefly from the following causes: first, the evident unsuitability of the Parochial Assessment Act to the rating of railway property; 2ndly, from the extreme difficulty of distinguishing the profits of trade made by a company as carriers, and by the use of engines and other personal property (in respect of which, as we have seen, they are not rateable), from the profitable occupation of the land upon which the railway is constructed; and, lastly, from the embarrassment which has been introduced by rating branch railways independently of main or trunk lines, when both are under one management, and thus raising the *veraxa questio* as to the rateable value of the former, when regarded as a feeder of traffic to the latter.

Inapplicability  
of Parochial  
Assessment Act  
to railway rating.  
*R. v. Great  
Western R. Co.*

With respect to the first cause of difficulty, we need only refer to the forcible language used by Lord Campbell, C.J. (*n*), and we shall see, at once, how great an obstacle is presented by the incongruous provisions of the Parochial Assessment Act. His Lordship, after expressing an earnest hope that some legislative enactment would relieve the Courts from the difficulty of administering the existing law, said,—

“The rule laid down by the Parochial Assessment Act is easily applicable to the property which the Legislature then had in contemplation, but it is wholly inapplicable to a railway extending many miles through many parishes, with a trunk line and branches, the traffic upon its different sections varying materially, and the expense of working these different sections bearing no certain propor-

(*n*) In *R. v. G. W. R. Co.*, 15 Q. B. at p. 397. And in *R. v. Coventry Canal Co.*, 28 L. J., M. C. 102; 1 E. & E. 572, where it was held that the expense of maintaining locks in a canal is not a local expense, but ought to be thrown on the whole line of canal, the same learned judge said, “There certainly is considerable difficulty in applying the rule laid down in the Parochial Assessment Act to canals and railways passing through many parishes; and we had hoped that the Legislature would have relieved us from the difficulty by laying down rules of rating more applicable to a species of property rapidly increasing

in amount, which does not seem to have been in contemplation when the Parochial Assessment Act passed. But the Legislature declining to interpose, we have been driven to dispose of all these cases in the best manner we could; and we see no aggravated difficulty in applying to these the only rule given to us, whether the companies are carriers themselves, or receive their profits in the shape of tolls for using the means of conveyance which they furnish to the public, without furnishing the vehicles to convey, or the moving power.”

tion to the earnings upon them. Required to determine how a railway company should be assessed in a parish through which a branch of the railway passes without any station within the parish, the traffic on this branch being comparatively small, and large outgoings being required, from the peculiarities of the locality, to keep in repair and to work the portion of the railway within this parish, we are directed to consider the rent at which this section of the railway might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes and tithe commutation rent-charge, and the only guide we have as to deductions, is to deduct the probable annual cost of repairs, insurance and other expenses, without any intimation as to what we are to do with respect to tunnels or embankments, or standing engines employed exclusively within the parish, or locomotive engines employed on the whole line, or the general expenses of the directors who manage the entire concern, or the charge arising from the maintenance of stations or the employment of police. If we settle all these and similar questions, we may be considered legislators rather than judges, making rather than expounding the law. At all events we must proceed upon a most improbable and nearly absurd supposition that a person may be found who would take the portion of the railway which passes through a single parish, and no more, as tenant from year to year.

"Without some alteration in or declaration of the law upon this subject by the Legislature, we foresee that, although we should give judgment between these parties, much trouble, litigation and expense must still arise both to parishes and to railway companies throughout England."

As to the second difficulty suggested, *i.e.*, that which proceeds from the necessity of distinguishing the profits of trade, and such as arise from personal property, from those which belong to the occupation of land, we may observe that this important investigation rests entirely with the Courts of Quarter Sessions, who are the sole judges of the facts in each particular case, and who alone can determine this difficult problem. The Court of Queen's Bench, adhering to old decisions, has resolutely declined to interfere with the findings of the sessions. As we shall see hereafter,<sup>1</sup> the mode now adopted to ascertain the rateable value of a railway is, first, to ascertain the gross receipts of the line within the particular parish, and then, by making a series of elaborate calculations, to endeavour to exhaust the proper deductions, so as to arrive at a sum which expresses the net rent which a tenant from year to year might be expected to give for the portion of the railway which is situate in the parish raising the rate. This being the state of the law, a Court of Quarter Sessions, in the early case of *Reg. v. Grand Junction R. Co.* (a), which was submitted to the Superior Court, invited the judges to say whether the proper mode of finding out the rateable value of the railway had been adopted by them, and we find the following answer returned:—

Necessity of distinguishing between profits of personality and profits of land.

Page 674.

*Reg. v. Grand Junction R. Co.*

"The gross yearly receipts of the company, as occupiers of and carriers on the railway, must at least include the proper subject-matter of the rate. The sessions

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of Railway  
Rating.

have, therefore, taken a sum agreed to represent them as the first point to start from. They then assume an amount of capital employed in the trade, and deduct from the former sum two percentages on the latter, for the interest of this capital and the profits which ought to be made on it, and a third for the depreciation of stock beyond usual repairs and expenses; 4thly, they deduct from the gross receipts the annual costs of conducting the trade; 5thly, they deduct the annual value of all the land occupied by stations, &c., and elsewhere rated; and, 6thly, a sum per mile for the production of rails, chairs, sleepers, &c. These deductions, taken together, seem to us to include whatever is properly referable to the trade, and distinguishable from the increased value which that trade gives to the land. We do not now speak of the *amounts* allowed under each item, and we decline to give any opinion on this point, which is properly for the sessions; but if these are the proper heads of deduction, then the residue must represent the value of the occupation; and if so, this alone is brought into the rate, and the profits of trade are excluded. Accordingly, the sessions have found, as an inference from the facts, that the residue is the sum which a tenant from year to year might reasonably be expected to give for the railway and corporeal hereditaments now occupied by the company in connexion with the railway, exclusive of the stations and other buildings rated separately, such tenant being assumed to have the same and no other power of using the railway—the same and no other advantages and privileges—as the company now possess. *If the deduction exhaust that portion of receipts referable to trade, the inference of the sessions is fair. If the advantages and privileges which the company possess are attributable to their occupation, and would pass with it, their assumption is well founded. We agree with them in both.*"

Reg. v. G. W.  
R. Co.

So, in the subsequent case of *Reg. v. Great Western R. Co. (p)*, where the same elaborate process of making deductions from the gross receipts of the railway company had been adopted, the sessions submitted to the judgment of the Court, as a distinct question for their determination, "the principle upon which the calculations were founded, and the propriety and sufficiency of the deductions." But the Court, although thus pointedly invited to the discussion of the amount and sufficiency of the deductions made by the sessions, declined, as they had done before, to answer the question in the following terms:—

"We are to see whether these deductions include all such as ought to be made on an ordinary occupation, exclusive of trade, and also all such matters as are distinctly referable to the trade only, and do not enhance the value of the occupation. If so, the principle of the rate is right; *whether sufficient in amount under each head has been allowed it is not for us to determine.*"

And, lastly, after having discussed in detail the various heads of deduction claimed by the company, but resisted by the parish officers, the judgment proceeds as follows:—

"Two more questions are stated: the first, as to the mode of ascertaining the tenants' profits, in order to their deduction from the rateable value. The

respondents have taken the original value of the plant or moveable stock, and allowed 10% per cent. upon it for these profits, as well as the profits of trade. The appellants say that the more correct mode would be to ascertain them by a percentage on the gross receipts, and claim to have 15% per cent. deducted from these on that account. We are very unwilling to withhold our aid in settling questions for the sessions of such novelty and difficulty as the railway rating must often bring before them; but we ought not to go beyond our province, and so, perhaps, mislead them. This question involves no principle of law, and we decline to answer it."

These cases, and others of a similar character, appear to justify the remark we have made, that Justices at Quarter Sessions are left to ascertain, as they best can, the rateable value of a railway (g); nor

Rateable value ascertained at sessions.

(g) In some of the cases, the Courts of Quarter Sessions seem practically to treat the land as the principal source of profit, whilst the capital and stock-in-trade,—the latter consisting of the locomotive engines and carriages used by the company in their trade as carriers,—all personal property, and consequently not rateable, seem to be considered as being merely accessory to the occupation of the land. This result has been arrived at by the process of making certain deductions from the gross receipts of the company, until the sessions at last arrive at the net rent which a tenant from year to year would be supposed to be willing to give for the occupation of the portion of the railway within the parish; and the Court of Queen's Bench has said, "Assuming that you allow sums sufficient in amount by way of deduction, we think the residue properly shows the rateable value of the land." Now it is to be observed that the rateable value of a farm or of a manufactory may be ascertained by a similar process to that introduced into railway rating, *i.e.*, by taking first the whole of the gross receipts of the farmer or manufacturer, and then by making deductions sufficient in number and amount to exhaust every portion of the receipts, except that which the farmer or manufacturer would be willing to pay as rent for his farm or manufactory; but it is extremely improbable that a surveyor would, under any circumstances, adopt this process (which seems ingeniously contrived to run up the rate on railways to the highest point) in proceeding to rate a farmer, much less a manufacturer. If we look accurately into the facts we shall see that the profits of a railway company, working their own line, are chiefly derived from two sources—the occupation of a certain quantity of land on which the railway is formed, and the possession of capital in money, and valuable personal property, in the shape of locomotive and other carriages, and various kinds of unfixed machinery: the company also employ a numerous body of clerks and other servants to carry on

the business of the railway. So the profits made by a farmer of land are, in like manner, chiefly derived from the same sources, *i.e.*, the occupation of a certain quantity of land, and the possession of a floating capital in money, and of personal property usually called his stock-in-trade, including cattle and other animals: he also employs numerous labourers in the management of his farm. Again, take the case of a large cotton or other manufacturer. Here we find an extensive manufactory, a large floating capital, valuable machinery, for the most part unfixed, and not liable to be rated, and a number of clerks and workmen employed in carrying on the trade.

In each of these instances, the railway company and the farmer are liable to be rated in respect of the occupation of the land, and the manufacturer in respect of the manufactory; but neither of them is liable to be assessed in respect of his personal property, *i.e.*, his machinery, implements, stock-in-trade or capital. Nor are the profits of his trade, as such, liable to be taken into account in assessing the rate.

In each of the supposed cases, the law requires that the occupier of the hereditament shall be assessed upon its net annual value, to be ascertained in the manner specified in the Parochial Assessment Act; and the question to be solved is, whether by the present mode of rating railways, the desired result is obtained. It must be remembered that there is an express provision in the last-mentioned act, "that nothing therein contained shall be construed to alter or affect the principles or different relative liabilities (if any) according to which different kinds of hereditaments are now by law rated" (ante, p. 642). So that no new or additional limitation is thrown upon any kind of property by that statute. Farmers and manufacturers would probably be liable to be rated for their stock-in-trade but for the stat. 3 & 4 Vict. c. 89 (ante, p. 612), because it is now generally understood that the decision declaring the non-liability of the farmer to

1. *Principles  
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Rating.*

does there seem to be any well-grounded expectation that the Legislature will interfere for their relief. The earnest appeal made, as we have seen, by the most eminent of our judges, produced no effect on our legislators; and, inasmuch as landowners, owners of tithe rent-charges, and railway and canal proprietors, are alike deeply interested, if even the slightest change is made in the relative proportions in which the rates are contributed, it is probable that matters will remain as they are. We must, therefore, proceed diligently to prosecute our inquiries for the purpose of pointing out the best mode of encountering difficulties which cannot be avoided.

Branch lines  
considered as  
feeders of traffic.

With respect to the third obstacle which arises from drawing a distinction, in rating, between a main line of railway and a branch line, and by treating the latter as a feeder of traffic, and consequently as a source of profit to the former, we may remark, that the necessity of discussing this point also arises from the ill-digested provisions of the Parochial Assessment Act. The difficulty seems to arise in the following manner. An independent company may be supposed to obtain an act of Parliament, and to construct a short line of railway which may form a junction with, or be near to, a trunk or main line belonging to another company. It may likewise be near to another line belonging to a third company; and thus this branch line becomes an object for competition between the proprietors of two other lines of railway, because it may be advantageously used by either of them, as a feeder to their own line and a withdrawer of traffic from the other.

Now, it is evident, that so long as this supposed branch line remains in the hands of an independent company, who may work or lease it, it is quite correct to assess it to the poor's rate according to the rent which either of those rival companies may be willing to pay for it (*r*), making of course the proper deductions according to the statute; and it will be found, when the cases are examined, that the learned judges are quite agreed on this point. But in two cases,\* where other companies had succeeded in acquiring branch lines of railway, either by purchase or by becoming lessors, much discussion was raised upon the question, whether their value as feeders to the main lines, into which they had been merged, was or was not to be taken into account in assessing the rate in a particular parish; and after these cases had

\* Page 657

be rated for his stock-in-trade, as decided in *R. v. Cuper* (12 A.D. & E. 382), was founded on the technical ground that the case did not state that the farmer was an inhabitant of the parish; and it was a representation of that circumstance which induced Parliament, upon the demand of the tithe-owners, to pass the act 3 & 4 Vict. c. 89. It is unnecessary to comment

upon the obvious injustice of rating railway companies upon profits derived from personal property, whilst other owners of similar property remain untaxed in respect of it.

(*r*) *R. v. L. & N. W. R. Co.*, L. R., 9 Q. B. 134, S. C. nom. *R. v. Bedford Union Assessment Committee*, 43 L. J., M. C. 81, post, p. 678.

been discussed at great length in the Court of Queen's Bench, the learned judges differed in their opinions. An additional perplexity is thus presented to our parochial authorities, and the legal puzzle is subjected to an additional entanglement. We believe, however, that on a careful examination of the two cases referred to, it will be found, that the judges do not differ in their opinions upon any principle of law, but merely drew different inferences from the facts as stated in the special cases (s).

## 2. Observations on decided Cases.

2. Observations  
on decided cases.

Having made these preliminary remarks, we proceed to direct attention to the numerous cases which have been decided; and, for the sake of brevity, such portions only are extracted as appear necessary to elucidate our inquiry, and a reference to the cases will supply any omission which may be inadvertently made of material points connected with the questions under consideration (t).

The London and South Western case (t), which was first submitted to the Court of Queen's Bench, contains useful elementary informa-

Rateability of  
company as  
carriers.  
South Western  
Case.

(s) The proper mode of rating a branch line is shortly discussed, *post*, p. 657.

(t) The following table shows the order of the cases in point of date, and the various books in which they were reported:—

- June, 1842.—*R. v. London and South Western R. Co.*, 1 Q. B. 558; 2 Railw. Cas. 629; 6 Jur. 686; 2 Gale & D. 49; 11 L. J., M. C. 93.
- May, 1844.—*R. v. Grand Junction R. Co.*, 4 Q. B. 18; 13 L. J., M. C. 91; 8 Jur. 508.
- Jan. 1846.—*R. v. Great Western R. Co.* (first case), 6 Q. B. 179; 15 L. J., M. C. 80; 4 Railw. Cas. 28.
- Feb. 1851.—*R. v. London and Brighton R. Co.*, 15 Q. B. 318; 8 Railw. Cas. 440; 20 L. J., M. C. 121. [Two other cases, *R. v. South Eastern R. Co.* and *R. v. Midland R. Co.*, were decided by the judgment given in this case.
- Feb. 1852.—*R. v. Great Western R. Co.* (second case), 15 Q. B. 379, 1085; 21 L. J., M. C. 84; 7 Railw. Cas. 130.
- Jan. 1854.—*R. v. Newmarket R. Co.*, 3 E. & B. 94; 23 L. J., M. C. 76; 18 Jur. 572.
- Feb. 1854.—*R. v. South Eastern R. Co.*, 3 E. & B. 491; 23 L. J., M. C. 84; 18 Jur. 873.
- Nov. 1860.—*R. v. North Staffordshire R. Co.*, 30 L. J., M. C. 68; 3 E. & B. 392.
- Jan. 1861.—*R. v. Fletton*, 30 L. J., M. C. 89; 7 Jur., N. S. 518.
- April, 1863.—*R. v. St. Pancras*, 3 B. & S. 810; 32 L. J., M. C. 116; 9 Jur., N. S. 1102.
- May, 1863.—*R. v. Lord Sherard*, 33 L. J., M. C. 5.
- " " —*R. v. Epsom and Epsom R. Co.*, 1 B. & S. 58; 32 L. J., M. C. 171; 9 Jur., N. S. 1339.
- " " —*R. v. Stockton and Darlington R. Co.*, 8 L. T. 122.
- Nov. 1863.—*L. and N. W. R. Co. v. Churchwardens, &c. of Charnock*, 9 L. T. 325.
- Nov. 1864.—*R. v. Midland R. Co., Midland R. Co. v. Badgworth*, 31 L. J., M. C. 25; 11 Jur. N. S. 14; 11 L. T. 303; 13 W. R. 202.
- May 1866.—*Great Eastern R. Co. v. Houghley*, 35 L. J., M. C. 229; 7 B. & S. 624; 1 R., 1 Q. B. 666.
- Jan. 1867.—*Great Western R. Co. v. Badgworth*, 36 L. J., M. C. 33; 1 R., 2 Q. B. 251.
- Feb. 1869.—*R. v. Rhymney R. Co.*, 1 R., 4 Q. B. 270; 10 B. & S. 198; 38 L. J., M. C. 75.



2. Observations  
on decided Cases.

tion on the subject of railway rating; but the general question, as to the exact mode of rating railways, was not much discussed. The principal point suggested in that case, on behalf of the railway company, was, that the tolls alone (as distinguished from fares) which the company were authorized to take from the persons who used the railway with their own carriages formed the basis on which the rate was to be calculated; and the case found as a fact, that, if the company were wrong on this point, then a certain sum (70,000*l.* per annum for the whole railway) was the rent which a tenant would be willing to give for the occupation of the railway, with all its attendant advantages, under the provisions of the Parochial Assessment Act. The sums were therefore agreed upon between the parties, and it was unnecessary to consider whether the profits of trade, as such, were included in the larger assessment of 70,000*l.* per annum or not (*u*); and, the Court having ruled that the principal point contended for by the company could not be sustained, the purposes for which that case seems to have been raised were answered.

*Grand Junction  
Case.*

In the *Grand Junction* case (*x*), the next in order, the same question, as to making the tolls the basis of the rate, was again submitted to the Court, and a distinction in favour of the railway company was attempted to be set up, on the ground, that persons other than the company used the railway as carriers, which was not the state of the facts in the previous case. The Court, however, adhered to their former decision, and said that the two cases were in principle the same. It is said on this point,—

“Each of the two companies must be rated in respect of the occupation of the land: one of them derives no benefit from that occupation, except by carrying goods and passengers, and the division of that profit into tolls and fares we think merely nominal; the other in addition to this mode of profit by occupying, also derives a profit from allowing others to carry goods and passengers on

April, 1869.—*R. v. Llantrissant*, L. R., 4 Q. B. 354.

“ „ „ *S. C. nom. Great Western R. Co. v. Pontypridd Union*, 38 L. J., M. C. 93.

Jan. 1874.—*R. v. London and North Western R. Co.*, L. R., 9 Q. B. 134.

“ „ „ *S. C. nom. R. v. Bedford Union Assessment Committee*, 43 L. J., M. C. 81.

May, 1874.—*East London R. Co. v. Whitechurch*, L. R., 7 H. L. 81; 43 L. J., M. C. 159.

Nov. 1874.—*Stratton v. Metropolitan Board of Works*, L. R., 10 C. P. 76; 44 L. J., M. C. 33.

May, 1875.—*R. v. Midland R. Co.*, L. R., 10 Q. B. 389; 44 L. J., M. C. 137 (Lighting and Watching Rate).

June, 1875.—*L. and N. W. R. Co. v. Duckmaster*, L. R., 10 Q. B. 70, 444; 44 L. J., M. C. 29, 180.

(*u*) It is said by the Court, that the stat. 3 & 4 Vict. c. 89, which, as we have seen, abolished rating in respect of the profits of stock-in-trade, or other personal property, had little or no bearing on the question submitted to them. See 1 Q. B. 577. And

it is remarkable, that, from the peculiar mode in which all the cases have been prepared, the effect of this statute on railway rating has never been directly discussed.

(*x*) *R. v. Grand Junction R. Co.*, 4 Q. B. 18.

the line also ; and this latter profit is properly called tolls. Still, in both cases, the inquiry must be the same—What is the value of the occupation, from whatever source derived ? In neither can the profits of trade, as such, be brought into the rate ; but, if the ability to carry on a gainful trade on land adds to the value of the land, that value cannot be excluded on the ground that it is referable to the trade.”

But another question of great importance was, in the Grand Junction case, submitted to the Court. It appeared that the Court of Quarter Sessions ascertained the rateable value of the railway in the following manner :—The gross receipts of the company were first ascertained, and, the problem being to cut down this gross sum to the net rent which a tenant would give for the railway, various items of deduction, amounting to six in number, were allowed ; and an attempt was thus made to call upon the Court of Queen’s Bench to determine the proper method of ascertaining the rent ; and also to verify the calculations upon which the estimate was founded. It was upon this occasion, and in the language already cited, that the Court of Queen’s Bench first intimated, in a case of railway rating, that it was sufficient for them to say, that the proper heads of deduction had been observed, but with the amounts allowed under each item they had nothing to do.

Sessions must decide amounts.

We now arrive at the first Great Western case (y), and the first thing which arrests our attention in the judgment is a recapitulation by the Court of the points decided in the two previous cases, which we have already commented upon. The Court say,—

Increase of value of land from carrying trade.  
*Great Western Case (No. 1).*

“ In these two cases we laid down, that, although the profits of trade carried on by the occupier of the land upon it cannot be made directly the subject of the rate assessed in respect of such occupation, and the value of the occupation alone was the proper subject, yet in that value was to be included whatever at the time formed part of it, whether permanently or not, and from whatever source derived ; and, therefore, of course, not less so, although derived, in any proportion, from the fact of the trade being so carried on upon it. Further, that although the sum to be sought was that which, after all due deductions made, a tenant might be found to give by way of rent from year to year, in order to be placed as occupier in the same position as the party rated, yet this was to be sought, not by dryly considering what rent would be given for so many miles of railway as happened to be in the rating parish, apart from all the actually co-existing circumstances, but by including in the consideration all such as would necessarily attend upon the occupation under the demise, and influence the tenant’s mind as to the amount of rent which he would give. In the application of these principles, the practical difficulty for those who assess the rate in cases of such complication as railways often present, will be, to distinguish accurately between that which is properly referable to the trade alone, and that increase of value which the carrying on of the trade upon the land gives to the occupation of it. The case of the *Grand Junction Railway*\* presented many circumstances the same

\* Ante, p. 650

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on decided cases.

as exist in the case now before us, and we thought that the parish officers there had successfully met the difficulty."

The Court then proceed to point out the proper items of allowance which ought to be made; and, as the rules laid down have been since almost invariably adopted, it will be useful to state them in some detail:—

"We are now to examine the rate stated in this case,—only, however, as to its principles, and so much of its details as involve principle; beyond that, and especially as to the accuracy of calculations, the questions must be for the sessions alone. We have here a company, sole occupiers of a line of which they are owners. Of this, the land in respect of which they are rated forms a part; they are also sole occupiers, as lessees, of two branch lines, both issuing out of the line first named. Upon all these lines they carry on exclusively a large trade as carriers, the net receipts of which, from the branch lines alone, if set against their expenses and rent, would make the occupation of them in fact a losing concern; but this occupation increases the traffic upon the main line, and for the sake of this, the company are content to sustain that partial loss. In order to ascertain the rate, the course pursued has been, to take the gross receipts per mile in the respondent parish; and this sum is not in dispute. The deductions to be made from this are calculated on a mileage proportion of all the expenses and outgoings, taking the whole three lines as one entire line in all particulars in which the appellants are at all chargeable; and we do not understand this mode to be objected to. Setting the proportion of these per mile against the gross receipts per mile, the residue has been taken as the rateable value per mile. We are then to see whether these deductions include all such as ought to be made on an ordinary occupation, exclusive of trade, and also all such matters as are distinctly referable to the trade only, and do not enhance the value of the occupation. If so, the principle of the rate is right. Whether sufficient in amount under each head has been allowed, it is not for us to determine. Nine heads are first stated, which are intended to represent the annual expense of keeping in repair the way, stations and other buildings, the rates and taxes, other than the property tax, payable on them, the expenses of directing and carrying on the business, the government duty on passengers, and some incidental charges connected with the trade. Thus far the outgoings allowed for are annual."

Heads of deduction.

After laying down the rule—since reversed—that deductions ought not to be allowed for repairs unless their expenses were defrayed out of revenue, the Court proceeded:—

"The appellants next claim to deduct the rateable value of the buildings appurtenant to their own line, and also to the branch lines respectively, and rated and rateable elsewhere than in the respondent parish, separately from the railway itself. This also is an allowance which was conceded in the case last referred to; for it would be hardly worth while to distinguish between those rated and rateable only; and we have no means of drawing the distinction in fact. It is to be remembered, that the respondents properly treat the whole line, the whole profits, the whole outgoings, as entire; and then the question is, whether there is any distinction between this and other outgoings necessary to the earning the profits by which the rateable value of the land in the respondent parish

is enhanced. It seems to us there is none; and, if so, we agree with the learned counsel for the appellants, that, in principle, it is indifferent whether the station be in the same parish or at a distance. The appellants claim, thirdly, an allowance for 21,000*l.* yearly, interest on the sum expended in forming their company, obtaining their act of Parliament, raising their capital, and other original expenses. For this there is no foundation. These expenses have no connexion with the rateable value of the railway. They might all have been incurred, and no railway ever constructed. As well might the purchaser of an estate with borrowed money, and after an expensive litigation as to the title, claim to deduct his interest and expenses from the poor rate on the land when in his occupation. They neither add to the value of the occupation, nor are anyway necessary to the making of it up. The appellants then claim to be allowed in respect of 10,000*l.* paid by them as income tax under stat. 5 & 6 Vict. c. 35. The claim is very shortly and unsatisfactorily stated. In respect of what the payment has been made, we are not informed on either side: the argument respecting it was short. The respondents treated the claim as made in respect of the charge on the property in land payable by the owner; the appellants claimed it in respect of the charge on the occupation payable by the tenant, and to this extent at least it does not strike us that there is any reasonable distinction between this and any other outgoing chargeable on the tenant, which would certainly affect the amount of the rent he would be willing to pay. The fifth claim is to be allowed for such additional parochial assessments as may become payable,—it is not said when or where,—in consequence of the recent decisions of this Court, upon which we will only say that we think that the Court would have been well justified in refusing to permit it to form part of the case. In the sixth place, the appellants claim to be allowed a deduction in respect of their loss on the two branch lines before referred to. We think this cannot be allowed. If the rate in question had been imposed on land forming any part of the branch lines themselves, it is clear that the circumstance of the receipts not equalling the rent,—in other words, that the line was worked at a loss,—could not have affected the rate; the occupation would have still been beneficial in the sense in which that word is used, for the purpose of assessing the rate; and the rent, which, from whatever motive, the appellants found it worth their while to give, would have regulated the amount. This is not that case in the way in which it is sought to make this expenditure bear upon the rates assessed on any part of the main line; it is more like money laid out in the way of improvement, for which no deduction should be made. If the lessee of a coal-mine were to open roads through adjoining lands rented upon a separate demise, in order to facilitate the access of customers to the mine, and so increase its profits, the expense of such roads would certainly not be an outgoing to be allowed for by the overseers."

Finally, the difficult problem of ascertaining "tenants' profits" was thus dealt with by the Court:—

"Two more questions are stated: the first, as to the mode of ascertaining the tenant's profits, in order to their deduction from the rateable value. The respondents have taken the original value of the plant or moveable stock, and allowed 10*l.* per cent. upon it for these profits, as well as the profits of trade. The appellants say that the more correct mode would be to ascertain them by a per-centage on the gross receipts, and claim to have 15*l.* per cent. deducted from these on that account. We are very unwilling to withhold our aid in settling

Tenants' profits.  
Depreciation of  
rolling stock, &c.

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Increase of Value  
of Land from  
carrying Trade.  
*Great Western  
Case (No. 1).*

questions for the sessions of such novelty and difficulty as the railway rating must often bring before them ; but we ought not to go beyond our province, and so, perhaps, mislead them. This question involves no principle of law, and we decline to answer it. The last is only raised by the respondents provisionally, in case any of the deductions claimed by the company should be allowed by us. But this has been done :—in ascertaining the tenants' profits, they have calculated the per-centage on the original value of the moveable stock ; but the sessions have found, that, at the time of the rate being made, the value had become less by 80,000*l.* ; and the respondents contend that the per-centage should properly be made on the smaller sum. This seems to us correct ; they are to make the rate from year to year, or for whatever shorter period, *conformably to the facts as they exist at the time of making it (z)*. They may not know, nor have any means of knowing, what the value was originally or in any former year. If, at the end of five or ten years, they are to be driven back to the original value, they may be equally required to ascertain it after an interval of a century. No hardship is inflicted on the appellants by this ; they may, and they ought, as prudent owners, to keep up the stock at its original value, and in this very case they have claimed a deduction for doing so. If that claim were properly made, the original and the present value would be the same. Although, however, we thus answer this question in favour of the respondents, they cannot avail themselves of the decision so as to increase their assessment beyond its present amount."

Parochial  
principle."  
*Brighton Case.*

The case next in order of time, *R. v. London and Brighton R. Co.* (a), establishes the most important rule, that the rate must be founded upon the parochial principle, and not upon a mileage calculation. The Court observes,—

"The question is as to the principle on which the rate is to be imposed, whether upon what has been called the mileage principle, that is, by treating the whole line of railway (trunk and branches) as one entire subject-matter, and the whole rateable value, however constituted, as entire, and then, for the purpose of rating, dividing it among the several parishes, simply according to the distance which the line passes through each ; or upon the ordinary principle of ascertaining the actual rateable value of the land occupied by the company in each parish, by the rules which are applicable to any other land occupied by other bodies or persons for other purposes. The judicial decision of this question has hitherto been avoided by agreement and mutual concession ; and we have delayed to pronounce our judgment on it, not so much from the difficulty of determining the rule of law, as from that which arises on its practical application. This presses particularly against what is called the parochial principle. How are you, by any means now in the power of parish authorities, to ascertain the particulars of profit and the outgoings, from a comparison between which the rateable value of the land occupied is to be deduced, both profit and outgoings being affected by circumstances spread through the whole line ? On the other hand, against the mileage principle is to be urged, that although, as regards the railway company—an entire body, with an entire interest—it is a matter of indifference how you divide a rate assumed to be entire for the whole line ; yet, as the parishes are bodies with separate interests, there is a manifest injustice in attri-

(z) *Acc. R. v. North Staffordshire R. Co.*, 30 L. J., M. C. 68, post, p. 684.

(a) 6 Railw. Cas. 440.

buting to the same space of land the same proportionable share of the whole rate everywhere; the land in the several parishes notoriously earning the profits, and occasioning the outgoings, in very different proportions; because you cannot do this without depriving some parishes of what they should receive in order to give to others what they should not. If, however, the legal principle be clearly ascertained, it is clear that the difficulties in applying it, or even the practical imperfection which circumstances may occasion in applying it, are not to influence our decision. It is unnecessary to consider what the force of the argument would be, if it could be shown that there was an absolute impossibility of applying it, for nothing like that exists in the present case.

“Now upon the legal principle we have no doubt. The poor’s rate and the principles of its assessment are entirely statutory. The 6 & 7 Will. 4, c. 96, made expressly with the view ‘to establish one uniform mode of rating for the relief of the poor,’ prescribes the rule: the rate must be made on ‘an estimate of the net annual value of the several hereditaments rated thereunto,’ such value to be arrived at in the manner stated in the first section. The subject is parochial; the inquiry is to be conducted by parochial authorities, with limited powers. If any matters specified in the section are locally situate without the parish—that is, if any such affect the amount of ‘the net annual value,’ or ‘rent reasonably to be expected’—they will of necessity fall within the range of the inquiry; but beyond this the principle does not go.

“This principle, so limited and understood, was not first created by the statute just mentioned; the Court had decided so early as 1827, in *Il. v. Kingswinford* (b), that it was to be found in the original statute of Elizabeth; and since that decision it has been uniformly applied to cases where the same party, whether company or individual, occupies in different parishes land forming one entire property, such as a canal, though the profits may be earned in different proportions, and with a different rate of outgoings in each. The value which the land occupied in each parish produces, after the due allowances, is that upon which the occupier is to be rated in each.

“It is unnecessary to cite more authorities in support of a proposition now become settled; the decisions will be found to flow in a remarkably uniform current since the case last cited (c). Whether the circumstances of railways, which were in 1836 a comparatively infant interest, escaped the notice of the Legislature, or were advisedly thought not to need any special provision, certain it is that none was made; and, as in its broad principles the occupation of a railway company does not differ from that of a canal company, a court of law has no choice but to apply to it the same general law under which, in its terms, it certainly falls.

“It is to be remembered, that the amount of assessment on a particular occupier is a question between that occupier and the rest of the contributors to the whole rate: and the consideration of that occupier’s relation to the contributors to another rate in another parish is irrelevant to this question; he may be rated in that other parish too high or too low, but this is a matter which does not interest the contributors to the first-named rate, nor have they influence in the

“Parochial principle,” to be found in Act of Elizabeth.

(b) 7 B. & C. 236; 1 Mann. & R. 20.

(c) In *R. v. West Midland Waterworks Co.*, 1 E. & E. 716; 28 L. J., M. C. 135, Wightman, J., in delivering judgment, said, “The parochial principle of apportionment has been unanimously upheld hitherto in respect of all canals,

railways, water companies, gas companies and bridges. See also *Chelsea Waterworks Co. v. Putney*, 29 L. J., M. C. 236; *R. v. Sheffield United Gas Light Co.*, 32 L. J., M. C. 169; 4 B. & S. 135; *G. E. R. Co. v. Harghley*, 35 L. J., M. C. 229; L. R., 1 Q. B. 606, post, p. 672.

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settlement of it : and this suggests the answer to a difficulty raised on the argument in this case—if you give Croydon the full benefit of all the earnings made by the railway in the parish, what is to be done in the case of a parish on some branch line, in which the company may work at a loss? The answer is, that that case must be decided, when it arises between the company and that parish, on the same principle precisely as the present, without reference to Croydon.

"This is quite distinct, however, from the consideration of any expenses, wherever arising, which the occupier can show to be necessary for keeping the hereditament which is the subject of the assessment at the value which is made the measure of it. The language of the statute is quite general on this point, and lets in all considerations which are necessary for the just protection of the company in each parish.

"Whatever difficulty there may be in applying this principle, it has been in fact overcome in the present case. Here, under circumstances more than commonly complicated, the sessions have presented us with calculations to meet the parochial as well as the mileage principle; they are exclusively the judges of the fact, and we must assume that they have been able to arrive at a just conclusion. Nor, indeed, does it appear to us, under any circumstances, to be insuperably difficult to impose the rate fairly, if only the interested parties will deal candidly with each other. We cannot assume that they will deal otherwise; but if the company should improperly refuse to the overseers of any parish information which it is in their power to afford, and is proper to be afforded, for the purpose of fixing the assessment on them justly, they must, if properly dealt with, be the sufferers."

Production of  
company's ac-  
counts recom-  
mended.

The Court then proceed to comment on two sections in the special act, which authorized the parish officers to inspect certain accounts kept by the railway company; they observe that the materials for making these accounts up were in the possession of the company, and that it was manifestly their interest to produce them, because out of them would arise the evidence on which the claim for deductions must be supported; and the Court add, that if the company would not afford the information necessary for these being duly made, they must expect that any court of justice would presume against them; and that there was the further substantial consideration, that in all litigation, even if successful, the company must, as considerable rate-payers, at all events, contribute very largely to their opponent's expenses, and they conclude as follows:—

"On these broad principles, therefore, that the statute provides but one rule, and intends to secure uniformity; that we have no power to substitute another; that the decisions hitherto are consistent; and that there is no insuperable difficulty in the practical working of the rule; we are of opinion that the respondents are right in their principle of assessment, and that upon this point our judgment must be for them."

Allowance for  
repairs, though  
not charged to  
revenue.

The second question submitted to the Court in this case was, on the right of the company to a deduction from the rateable value,

beyond the ordinary expenses of keeping the railway in repair, in order to countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the supposed rent, which is the measure of the assessment; and upon this point the Court decided that the company were entitled to make this deduction, even although no such expense had been actually incurred or charged on the revenue during the current year, and this ruling was affirmed in a subsequent case (*d*), overruling, as we have already remarked, a previous decision (*e*).

On a third question, which arose as to the effect of an exchange toll, it appeared that the railway company, who were appellants, had agreed with another railway company that the traffic of the latter should pass free over a certain portion of the line of the former, in consideration of the traffic of the former passing free over a certain portion of the line of the latter; and that a certain distance of the appellants' line, within the respondent parish, was affected by this arrangement; the Court said that the sessions rightly decided this to be rent in kind, earned by the land, but that these earnings must be subject to exactly the same deductions as if they were received in money.

Value of exchange toll to be included in assessment.

The only remaining point in this case turned upon the narrow question—From what date the overseers ought to make their calculations as to the assessment on the company. The date of the rate was the 20th of November, 1847; and, as regards the company, it was based on a half-yearly statement published by them on the 10th of August, but made up only to the 30th of June preceding. In the interval between the 30th of June and the 20th of November, the value of the working plant of the company had been increased from 260,000*l.* to 350,000*l.* The deduction on this outgoing the company claimed to be entitled to; and the Court decided that they were entitled to it, and observed that the sessions ought to avail themselves of every light that can be afforded them, down to the latest period antecedent to the actual making of the rate, in order to bring it to the greatest possible accuracy; that overseers, in making a prospective rate, are to make it on the supposed prospective value, ascertained by them, as well as they can, from the latest evidence in their power as to antecedent value.

A rate must be made on the prospective value of the undertaking.

In *Reg. v. Great Western R. Co.* (No. 2) (*f*), an embarrassing question arose as to the proper mode of rating two miles and a half

Rather a branch where branch used in main line, but worked differently.  
*Great Western case* (No. 2).

(*d*) *Great Western case* (No. 2), *infra*.  
(*e*) *Great Western case* (No. 1), *ante*, p. 651.  
(*f*) 15 Q. B. 1085. As to rating a

leased line as an independent line, see *North and South Western Junction R. Co. v. Brentford Union Assessment Committee*, L. R., 18 Q. B. 11, 710.



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\* Page 651.

of a railway twenty-five miles in length, the latter being a branch of the Great Western Railway, and, with the exception of the few remarks which were made by the Court in commenting on the sixth head of claim in *Reg. v. Great Western R. Co.* (No. 1),\* this was the first time that the distinction between a branch and a trunk line had been discussed in the Court of Queen's Bench, although at Courts of Quarter Sessions the subject was beginning to attract considerable attention. The question submitted to the Court was, whether, for the purpose of the rate, these two miles and a half were to be considered as part of this branch, treated in most material respects as an independent whole, or whether as part of the whole Great Western Railway, including the branch, without introducing any distinction between branch and trunk; and it appeared that the appellants had proceeded on the former, and the respondents on the latter, assumption. The Court observe upon this important point,—

"We think that it will clear our way to adopt, in the first place, for the sake of argument, the assumption of the respondents. Both parties have agreed that it is important to settle four points as cardinal to the decision of the case. First, the total gross annual receipts of the appellants from the whole line, including both trunk and branch; secondly, the total gross annual receipts from the two miles and a half; thirdly, the allowances and deductions which are to be made from the first-mentioned sum, so as to give the net rateable value of the whole line; and fourthly, the net rateable value of the two miles and a half. With respect to the first two of those, they are agreed; and although there be a difference as to the third, it is not so much in principle as in matter of fact; this difference we will settle first. The appellants, in addition to allowances for annual repair of rails and framework, and of moveable stock, claim to be allowed two specific sums for their ultimate renewal and reproduction."

The Court "felt the difficulty which existed in theory with regard to this claim," but adhered to their considered judgment in the *Brighton Case*,\* and being of opinion that the question was concluded by that authority, decided for the appellants on this point, although the appellants did not annually set aside any sum to form a distinct fund for the renewal and reproduction, but merely retained out of revenue a reserve fund for all contingencies, including these items among them. They then proceeded:—

"We have now, then, three points out of four settled; the remaining question is, what is the net rateable value of the two miles and a half? Now, as the net rateable value is that which remains of the gross receipts after all just deductions are made, it might seem at first sight that we might confine our inquiry to the two miles and a half, and that we only encumber the investigation uselessly by introducing into it any consideration of the gross and rateable value of the whole line. But the circumstances of a railway make this absolutely necessary. The inquiry may become, and undoubtedly does become, more complicated and difficult

thereby, but it would be wholly incomplete and illusory, even in its result, unless we did so. Of the outgoings of a railway some are general, having no more connection with or influence on one part of the whole line than on any other, incurred for the sake of the whole line, and contributing to the profits everywhere. Of course these must be distributed, and to every mile must be apportioned some share, on whatever principle the apportionment is to be settled. Some, again, seem purely local—a tunnel here, an inclined plane there (we purposely mention striking and definite peculiarities)—yet even these are contributing to the earnings everywhere; without these the traffic on either side could have no existence. It would be wrong to set these wholly and exclusively against the receipts earned in the same part of the line (*q*). We need not dwell on this, because in principle some distribution is on all hands agreed to be necessary, the only difficulty is in determining what is to be adopted for making it justly,—a difficulty we believe actually insurmountable in fact, if strictly mathematical accuracy were insisted on. It is our business, however, only to lay down the general rule, and, in applying it, much must be left not only to the experience and acuteness, but also to the good sense and good faith and candour of the parties concerned, whose interests will be found in the end to be best consulted by this mode of dealing. Now, then, are the deductions from the total gross revenue which constitute the difference between it and the total net rateable value to be apportioned, so as to arrive at the actual sum which constitutes the rateable value of the two miles and a half? There is no difficulty in giving the first answer; indeed, principle and authority leave us no option—it must be done by acting on what is called the parochial principle. We are dealing with a parochial question, with one in which the interests of the several parishes on a line of railway are quite distinct. We are to ascertain what expenses are incurred in earning the gross receipts on the two miles and a half; what charges, parochial or otherwise, they are liable to; what is fairly to be deducted for tenants' profits, and so on—the same process in kind is to be gone through with regard to the two miles and a half, as would be with regard to the whole line, if that were all in one parish. We need not now repeat the reasoning which appears in our judgment before referred to [*The Brighton Case*, p. 654, ante]. But, as we then said, and have now repeated, this principle does not preclude a consideration of charges and expenses wherever arising locally, which are necessary for keeping the subject of assessment at the value which is made the measure of that assessment. And further, we must add, that *whenever it is found that such charges and expenses do in fact apply equally to every mile of a railway, it is a convenient and allowable mode to arrive by a mileage division at the proportionate part to be assigned to the miles in any particular parish.* This is no departure from the parochial principle, if it be assumed as to particular charges (central superintendence, for instance) that a separate investigation of them as they actually arise in, or are referable to, a particular parish would lead us to the same result as a mileage distribution of the whole. It becomes by the hypothesis but another mode of arriving at it; in many cases it will be more convenient and just, in some, perhaps, it may be the only practicable mode.

“Having now laid down the principle, it would be right to apply to it what the case finds as to the two modes which have been respectively adopted by the parties,—and first, for convenience sake, to that of the appellants. ‘They,’ it is said, ‘have taken the gross receipts per mile per annum in the respondent parish exactly as the respondents had done, and they deducted from these the actual

(*q*) See also *acc. R. v. Country Canal Co.*, 28 L. J., M. C. 102; 1 E. & L. 572.

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Rating branch where fused in Main Line, but worked differently.

*Great Western Lines (No. 2).*

expenses of each mile ascertained or estimated.' If the case had stopped there, we should have supposed that they had strictly acted on the true principle, and we must have adopted their conclusion. But it is evident from what follows that we should have been led into error. For the case goes on thus:—'In order to do this, they ascertained the actual expenses incurred on the branch alone, and where those expenses were common to the entire branch, they divided such expenses by the number of miles in the branch, and they considered the result to be the expense of each mile in the branch. A small portion of the general expenses of the entire railway, being those of central superintendence, printing and advertising, were apportioned on the branch in the ratio of the business or traffic upon it, and such portion was subdivided as before, on the mileage principle.' This explanation shows that the appellants have, in fact, separated the branch from the trunk, except as to what they call a small portion of the general expenses of the entire railway, and then divided the expenses of the branch thus separated on the mileage principle.

"We do not think them necessarily wrong in this last particular: it may have been no practical departure from the true principle, but only an allowable instance of what we have above stated to be a convenient practice, where the actual expenses were the same on every mile; and as no objection is made to this by the respondents, we must assume that it was so. But the separation of the branch from the trunk is, in its effect, the substantial ground of dispute between the two parties, producing, it may be said, nearly the whole difference between 254*l.* and 30*l.* per mile; and unless they are justified in this, it is impossible that their mode of ascertaining the rateable value can prevail, and we think they are not. We wish it to be distinctly understood that we come to this conclusion solely on the facts of this case. We are far from saying that there may not be cases in which two lines, connected for many purposes and worked by the same company, may yet have been kept so distinct by the statute or agreement which creates the connection, or by the circumstances under which they are worked, that, for the purposes of rating, they would have to be separately considered as two distinct subject-matters. When such cases arise they must be dealt with according to their respective circumstances; but, *in the present case, the fusion of the two lines is complete.* The branch, as we have hitherto called it, is absorbed into the trunk, and whether Tilehurst is one or the other, our decision must have been the same; for, by the case it is found, that, by the 48th section of the special act, the appellants were enabled to purchase, and the company incorporated by that act to sell and transfer, the undertaking to the appellants, and, on the completion of the purchase, the appellants were to have and to hold the undertaking, the company to be dissolved, and the buildings and works to become part of the Great Western Railway. Accordingly, the appellants became the purchasers and proprietors, and by a subsequent act (9 & 10 Vict. c. xiv.), it was enacted, that it should thenceforth become part of the Great Western Railway.

"So much for what it is. And how has it been worked? The case finds, that, ever since its completion, and at the time of making the rate, it was and still is worked as part of the entire railway, known by the name of the Great Western Railway; that a certain number of engines and carriages are appropriated to it; and a certain number of officers and servants employed exclusively on it. No separate account of receipts and expenditure in respect of it is kept, but such receipts and expenditure are included in the general half-yearly revenue accounts laid before the proprietors. No separate annual account in abstract, showing the total receipts and expenditure in respect of it,

is prepared by the appellants, so as to be furnished to the overseers of the poor of the several parishes through which the said branch passes, in conformity with the 8 & 9 Vict. c. 20, s. 107 (Railways Clauses Consolidation Act, 1845).

“Thus it appears, both by the statutes and the acts of the appellants, that there is absolutely nothing to distinguish the miles in Tilehurst from miles in Paddington, Ealing, or any other parish on the original line. For the mere allotment of engines and carriages, or officers and servants, is nothing for the present purpose; it is merely an economical arrangement of the company for the working of this part of their line. We conclude, therefore, that a rateable value, ascertained by considering twenty-five miles as a distinct whole, cannot be correct; and, therefore, we cannot adopt that which is proposed by the appellants.”

The Court then proceed to consider the mode of rating adopted by the respondents. The case found on this head,—that having ascertained the rateable value of the whole railway, minus the stations, the respondents ascertained the gross actual annual receipts of the appellants in respect of each mile and portion of a mile of railway in their parish, and they assessed the appellants in respect of the two miles and a half in the ratio “which such annual receipts bore to the gross annual receipts of the company in respect of the entire Great Western Railway, trunk and branches, the rateable value of a mile of railway in the respondent parish being calculated in the same proportion to the rateable value of the whole line, exclusive of the stations, as the gross actual annual receipts in respect of such mile bore to the total of such actual annual receipts of the company.”

The Court disapproved of this mode of rating also, in the following terms:—

“It appears by the statement in the case, that the respondents have taken the deductions at the same rate for every mile of the railway; for they say, as the gross receipts of one mile to the gross receipts of the whole, so the rateable value of one mile to the rateable value of the whole: this is, in effect, to strike off from the gross receipts of a mile an aliquot part of the sum which is struck off from the gross receipts of the whole, and assumes at least that the expenses are at one uniform rate throughout the whole line. If the case were silent on this subject, we might have presumed that the respondents had ascertained this to be the fact, and then there would have been no objection to a mileage division; but the case, reasonably understood, excludes this, for it finds that the actual expenses of the company are not in the proportion of the actual gross receipts, either on the branch or throughout the entire railway; nor are either such gross receipts or such expenses at one uniform rate per mile throughout the entire railway. The counsel for the respondents laboured in vain to explain away the clear meaning of this passage, and, failing in that, they equally laboured in vain to show that all the expenses on a railway were necessarily to be distributed in calculation equally over the whole line.

“In the result, we cannot adopt either of the modes suggested to us, or confirm the rate at either of the sums stated; the consequence must be, which we very much regret, that the award must be referred back to the learned arbitrators, to whom the parties, and we ourselves, are so much indebted for the

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labour and ability which they have bestowed on the case. We trust that the principles we have laid down will enable them to agree on a satisfactory rate, and that there may be no more litigation on the subject."

Dividend guaran-  
teed on construc-  
tion of Branch.  
*Newmarket Case*

We now arrive at *Reg. v. Newmarket R. Co. (h)*, which introduced the difficulty already adverted to, as to the rateable value of a branch line when it is viewed as a feeder of the traffic on the trunk or main line of a railway. The question before the Court was shortly as follows:—The appellants, the Newmarket R. Co., were authorized by their special act to make a branch railway fifteen miles in length, by which a communication could be established between their branch line of railway and the main line of the Eastern Counties Railway; and the E. C. R. Co., being anxious that the branch line should be constructed, entered into an agreement (afterwards ratified by act of Parliament), wherein it was recited, that, "in consideration of the benefit likely to accrue to the E. C. R. Co. from the construction of the branch and the working of the railway of the appellants in connection with their railway, the E. C. R. Co. were willing to secure to the appellants certain advantages as hereinafter expressed and defined;" and it was mutually agreed between the E. C. R. Co. and the appellants (amongst other things) that the appellants should proceed with all convenient despatch to make and complete, at their own expense, the branch railway: and that if, in any year after the branch line was completed and opened for traffic, the net profits made by the appellants should not be sufficient to pay a dividend of 3*l.* per cent. on the whole of their share capital, then the E. C. R. Co. should pay the appellants such a sum as would be sufficient to make up the dividend to 3*l.* per cent. The appellants thereupon constructed the branch, and opened it for traffic; but after the gross earnings of the branch railway in the respondent parish had been ascertained, the amount of deductions proper to be made exceeded those earnings by 27*l.*, which it was admitted was the deficiency or loss of the appellants, as occupiers of so much of the branch railway as lay within the respondent parish.

It appeared, however, that during the current year, in respect whereof the assessment was calculated, the E. C. R. Co. had paid the appellants, in pursuance of the provision contained in the agreement, 3,700*l.*, being the sum required to make up the dividend on the share capital to 3*l.* per cent.; and the question submitted to the Court was, whether this 3,700*l.* ought to be taken into account in ascertaining the annual rateable value of the branch railway, and, if it ought, the sessions assessed the value of that portion of it which was in the respondent parish at 116*l.*, otherwise at 21*l.* only.

(h) 23 L. J., M. C. 76.

Upon this state of facts the learned judges differed in their opinions upon the questions submitted to them; Coleridge and Erle, JJ., held, that the payment ought *not* to be taken into account, as it was not an earning of the railway, nor rent, nor money in the nature of rent paid for the use of the railway, but a payment arising from a contract of guarantee, and not derived from the profits of the occupation of the land.

Coleridge, J., observed,—

“The substance of the actual agreement seems to be rather that of a guarantee, which is not to come into operation until the actual fruits of the occupation fall below a certain amount. The dividend on the capital is to be paid from the clear profits of the occupation; when they fail the guarantee comes in, not to increase those profits, but to make the dividend good from another and independent and collateral source. But it is the profits, after deducting the proper outgoings, upon which the rate is to be assessed; and when that is done, and not before, it will be seen whether the guarantee is to operate or not.

“It will be said, of course, that in order to arrive at the rateable value a negotiation for a lease from year to year must be supposed, and that the negotiation must be supposed to proceed on the footing of the lessee being placed in exactly the same position as the present occupiers, and this is unquestionable as to everything which necessarily arises from the occupation. But if thence it is inferred that the supposed lessee would necessarily, as such, have the benefit of this guarantee, it seems to me the very question in the case is begged. In point of fact, a lease of the line might very well be made, supposing the requisite powers, without involving a transfer of the benefit of this agreement to the lease.”

Erle, J., said,—

“The appellants contend that this sum ought not to be taken into consideration in assessing them as occupiers of the railway to the relief of the poor, as it is not an earning of their railway, nor rent, nor money in the nature of rent paid for the use of their railway, but a payment arising from a contract of guarantee and not derived from the profits of the occupation of the land; and I am of this opinion.—If the railway was let, the amount of rent would depend on the amount of annual profit derived therefrom, and it would be immaterial to the tenant whether this exceeded or fell short of 3*l.* per cent. on the cost price of the line. The cost of a construction does not indicate the profit to be obtained therefrom as a matter of fact, and it was decided in *R. v. Mile End Old Town* (5), to be no criterion in law of the rateable value of any property to the poor-rate. Furthermore, the sum paid under the guarantee is not rateable, for it is not a parochial profit. Nothing is due under the guarantee until the profits upon both the Newmarket and Chesterford and the Newmarket and Cambridge Lines have been ascertained, when, if the sum total is less than 10,500*l.*, the guarantors must pay. I am not able to discover how the failure of profits upon the parts of the line in distant parishes becomes a net profit upon the part of the line in St. Andrew-the-Less, for which a tenant of that part alone

(i) 10 Q. B. 208; 16 L. J., M. C. 164. See ante p. 611.

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Dividend  
guaranteed on  
construction of  
Branch.*

*Newmarket Case.*

would pay rent. Furthermore, the rate upon the sum paid under the guarantee is not legal, for it falls, not on the occupier, but on the guarantor. The rate is nominally on the Newmarket Co., but if it is sustained it must be paid by the Eastern Counties Co., who agree to make good the deficiency in case the net profits, after paying all deductions, will not yield a dividend of 3l. per cent. on the capital; in proportion as the deductions are increased, the net profits are less, and the deficiency to be made good is greater. On these grounds I have come to the conclusion that the sum paid under the contract of guarantee in this case was not rateable, and that the rate ought to be reduced accordingly."

On the other hand, Lord Campbell, C.J., whilst entirely concurring in the general principles laid down by those learned judges, arrived, nevertheless, at a different result on the effect of the statement of the facts in the case, as will appear from the following judgment (*k*); and it seems, therefore, that the difference of opinion did not so much arise on any question of law, as on the construction which ought to be put upon the facts stated in the case. He said,—

"I am of opinion that, in assessing the appellants for the portion of the branch line which is in the limits of the respondent parish, this payment ought to be taken into consideration. I think it is received by the appellants in respect of their occupation of their railway, and is part of the profits of that occupation. It is evidently made in consideration of an advantage which the Eastern Counties R. Co. calculated that they would derive from this branch railway from Chesterford to Cambridge. Whether it be a fixed annual sum, or a sum depending upon a contingency, it is equally in respect of the use made of the railway occupied by the appellants, and, when received, it is part of the profits of that railway. If the Eastern Counties R. Co. paid the appellants a sum of money for being allowed to bring passengers in their own carriages from Chesterford to Cambridge gratis, that those passengers might be carried on the Eastern Counties Line for hire from Cambridge to London, little doubt can be entertained that such a payment would be part of the profits of the branch of the appellants, and it seems to make no difference that the payment is made in respect of passengers brought from Chesterford to Cambridge in carriages of the appellants, the Eastern Counties R. Co. deriving the same benefit from conveying them forward to London. The railway within the respondents' parish is rendered more valuable and productive by something connected with the use of it in another parish, and, according to decided cases, its rateable value within the respondents' parish is thereby enhanced."

(*k*) In *R. v. Fliton*, 30 L. J., M. C. 39, Blackburn, J., said, that Lord Campbell dissented on the ground that the payment under the agreement was not in the nature of a collateral guarantee, but a sum received by the appellants in respect of their occupation of the railway, and was part of the profits of that occupation, and ought therefore to be taken into consideration in assessing the value of that occupation. In *R. v. Midland R. Co.*, 34 L. J., M. C. 25, it was held, that the

company could not be rated as occupiers of a line over which they had merely running powers, a mere easement. But in *G. N. R. Co. v. Badgworth*, 36 L. J. M. C. 33, it was held, that the company should be rated for *their* half of a line, over the other half of which they had running powers, upon the principle of assessing the profits made in the parish enhanced by the right of running free over the other half (which belonged to the Midland R. Co., who had corresponding rights).

After some further remarks his Lordship added—

“ If this branch was let to a tenant, he would be entitled, under the agreement, and the act of Parliament confirming it, to this contingent payment, and no doubt it would enhance the amount of the rent which, as a tenant from year to year, he would be willing to offer. I have only further to observe, in answer to an objection raised, that in my opinion the contention of the respondents does not lead to the double rating of the same profits; for, if the Newmarket Co. were rateable in respect of payment made to them under this agreement, or under an agreement whereby the Eastern Counties Co. undertook to pay them absolutely a certain sum for each passenger brought from Chosterford to Cambridge, the Eastern Counties Co. would be entitled to a deduction in respect of such payment from their gross earnings when the assessable value of *their* railway comes to be estimated. I wish to adhere to the recent as well as the earlier cases on this subject, with this caution, that when we were determining that in rating railways, the parochial, not the mileage, principle was to be adopted, the Court did not mean to intimate that assessable value of land in one parish ought not to be increased by a profit derived from it by the occupier, as occupier, in consideration of an advantage derived from it in another parish. Upon the whole, my opinion is in favour of the respondents, but there must be judgment for the appellants.”

The next case we have to notice, *R. v. South Eastern R. Co. (l)* also relates to the rateable value of a portion of a branch line of a railway running from Reading to Reigate, and passing through Dorking, the respondent parish. It appeared that this branch line was originally constructed by the Reading, Guildford and Reigate Co., but, under certain agreements entered into and confirmed by powers contained in their special act, the latter company, in 1850, leased the portion of the line between Dorking and Reigate to the South Eastern R. Co. for 1,000 years, at a yearly rent of 33,000*l.* and also on condition of the payment of 8,000*l.* per annum, as interest on a debt incurred in making the line. The respondents had, in a rate made whilst the lease was subsisting, assessed the South Eastern Co. upon a valuation founded upon the rent of 41,000*l.*, payable under the lease; and the case found, that if the rent was the proper criterion of the rateable value, then the assessment appealed against was correct. It was however found, that the gross earnings of the South Eastern Co. on the Reading, Guildford and Reigate line, less the proper deductions, did not in the year for which the rate was made amount to 41,000*l.* less the statutory deductions under the Parochial Assessment Act, and also that the Reading, Guildford and Reigate line brought a great deal of additional traffic to the main line of the South Eastern Railway, and the latter company thus derived benefit from the Reading, Guildford and Reigate line as a feeder to the main line in respect of traffic conveyed upon that line; also that the Reading,

Rating a branch  
where branch  
leased to main  
line.  
*South Eastern*  
*Case.*



2. *Observations  
in decided Cases.*  
Rating a Branch  
—continued.

Guildford and Reigate line, if in the market, might be an object of competition in consequence of the spirit of rivalry existing between the South Eastern and other companies, the traffic on the main lines of which would be increased by the possession and control of the Reading, Guildford and Reigate line.

The case then proceeded to state that, in 1832, an act was obtained, whereby the Reading Co. was dissolved, and their powers transferred to the South Eastern, and a perpetual annuity of £1,000*l.* was charged upon the whole undertaking of that company, payable to the shareholders in the dissolved company, by way of commutation for the yearly sums payable under the lease of 1850. It also appeared that another rate was made after the Amalgamation Act, which was also appealed against, and the whole of the facts and circumstances previously stated as to the first-mentioned rate were declared to be applicable as to the last rate, with the exception of the said lease, which was applicable only to the first-mentioned rate. Upon these facts thus briefly stated (which are to be found detailed at considerable length in the report of the case) three questions were submitted to the Court:—*First*, whether the appellants were properly assessed in the two rates appealed against in certain specified amounts, the assessments being founded on the said rent as to the first, and the said annuity as to the second rate, which assessments were taken as the proper criterion of annual value in each case. *Secondly*, whether they were liable to be assessed in respect only of the net profit derived from the traffic passing through Dorking, irrespective of any rent paid by the company, and the value of the Reading, Guildford and Reigate line as increasing the traffic on the main line. *Thirdly*, whether the respondents were entitled to take into consideration, in their assessment, the value of the line to the appellants, as an integral part of the South Eastern Railway, in addition to the net profit as derived from the traffic passing through the parish of Dorking.

Rent paid is only  
presumptive  
evidence of the  
yearly value.

The learned judges unanimously agreed, in answer to the *first* question, that the mode adopted of making the rent in one case, and the annuity in the other, the sole criterion for the assessment, could not be supported; the Court being of opinion, that rent paid at the time when a rate is made, is only presumptive evidence of annual value, which may be rebutted; and Erle, J., likened the case to an open coal-mine being let at a certain rent, and it being proved that the mine had become exhausted; or to an unopened coal-mine let at a rent agreed for, on the speculation that it would prove productive—cases in either of which, if nothing was obtained, the rent would be no evidence of rateable value.

On the *second* and *third* questions, the learned judges again differed in opinion; Lord Campbell, C. J., and Coleridge and Crompton, JJ.,

holding, that these questions should be answered—the second in the negative, and the third in the affirmative; *Erle, J., dissentiente*.

Lord Campbell, C. J., observed as to the second question,—

“I am of opinion that the liability of the appellants cannot be confined to the net profit derived by the appellants from the traffic passing through the parish of Dorking. They are only to be assessed in that parish in respect of property occupied by them in that parish: but its value in the parish may be enhanced by circumstances existing out of the parish. The appellants say truly, that they are not to be rated in this parish for profits made elsewhere. I wish implicitly to abide by what is called the ‘parochial principle’ of rating. But, upon that principle, we must see of what value the property rated in the parish is to the occupiers; and this is not necessarily determined by the pecuniary receipts for the use of it within the parish. The rent that was paid by the appellants is strong evidence that it was of greater value to them, than the mere net profit from the traffic upon it. We have an express admission that ‘the Reading line brings a great deal of additional traffic to the main line, and that they derive benefit from the Reading line as a feeder to the main line in respect of traffic conveyed upon that line;’ and ‘that the Reading line, if in the market, might be an object of competition between the South Eastern Company and other railway companies, the traffic on the main lines of which would be increased by the possession and control of the Reading line.’ Therefore, plus the net profits derived from the traffic passing through the parish of Dorking, the appellants do derive a profit from the occupation of the portion of the line in that parish. But it is said, that, in respect of this last profit they ought only to be assessed in the parishes through which the main line passes. I am of a contrary opinion. This profit, although not received for the traffic upon the line in the parish of Dorking, originates from the occupation by the appellants of land in the parish of Dorking; and if they are assessed in that parish in respect of this profit, in estimating their profits in the parishes through which the main line passes, there ought to be a deduction in respect of what is paid for the line, which is worked as a feeder to the main line. This calculation, though difficult, may be made upon the data which are accessible; and it is not more difficult than calculations which must be made in railway rating, where stations and inclined planes in one parish affect the traffic in another parish. Adhering to the parochial principle, I inquire of what value the land rated is to the occupier. Of this value the rent which he is willing to pay affords evidence; and from any profit which he indirectly makes from it out of the parish, part of the rent which he pays for it in the parish is to be regarded as a deduction. At the bar it was hardly denied that this would be the result, if the two railways belonged to different companies, and if the company whose railway is fed were to pay a regular fixed annual sum to the company whose railway is the feeder. But I do not see how it should make any difference to the parish of Dorking, that both lines are occupied by one company, and are worked as one concern. The advantage derived from the occupation of the portion of the line in that parish is still the same, although the process by which the amount of that advantage is to be calculated has changed. I adhere to the rule of rating which is laid down in *R. v. Newmarket R. Co.*,\* which I there attempted to support and illustrate. This, I think, is in entire harmony with our decision in *R. v. Great Western R. Co.*† In many cases, the supposed advantage derived by a railway company from a portion of a railway in a particular parish, bringing passengers and goods to another portion out of the parish, may be almost

\* Page 662.

† Page 661.

2. *Observations on decided Cases.*

*Ratinga Branch: Where Branch amalgamated with Main Line and perpetual Annuity charged on Main Line.*

*South Eastern Case.*

inappreciable, and I would earnestly dissuade parishes from ever making any claim under this head, unless where, upon clear evidence, the claim can in point of fact be established.

"As to the third question, I say, that the respondents are not entitled to treat the Reading line as an integral part of the South Eastern Railway, so as to depart from the parochial principle; but they are entitled to consider in the assessment the value of the Reading line to the appellants beyond the traffic passing through the parish of Dorking."

Coleridge, J., said,—

"I understand the second and third questions to be intended to raise three points:—First, must the assessment be made only on the net profits earned by the passage of goods and passengers over the land occupied in Dorking, and must any additional value which the occupation in truth may have, as increasing the traffic on the main line, be excluded? Secondly, may any additional value which the occupation of the land in Dorking may have, by reason of the amalgamation of the two lines, be included in the assessment? These two questions, I presume, were framed with a view to the different circumstances under which the two rates were made, in respect of the amalgamation. My answer to these questions will be this: Nothing is to be excluded which, I do not say has a tendency to add to (for of this no notice can be taken), but which actually adds to the value of the occupation; for the rate is to be regulated in amount by that value; and it is a principle, which I believe to be established by numerous decisions, that the inquiry is not so much where the profits of the occupation are produced, as whether any alleged profits are so directly referable to it as properly to be considered parts of the profits of the occupation, so that, to adopt the words of Mr. Cripps, in his sensible essay on the subject, 'the rateable value within the parish may depend on matter without the parish.' I am not aware that this conflicts with any decision. This principle was first laid down and acted upon in regard to railways in *R. v. London and South Western R. Co.*,\* and, as regards them, that case has been a governing authority ever since, from which I should be very sorry to depart. As I understood the two Tilehurst cases,† nothing was decided in either that at all breaks in upon it; and I certainly intend to adhere to both of those decisions. The principle, indeed, was well established as early as the *New River case* (m); and I have long considered it as well settled, that we are to apply the same principles to the rating occupiers of railways as of any other property, though the application may be in some respects much more difficult, and the results not always so certainly obtained. I by no means say that either the increase of the traffic on the main line, or the amalgamation of the two lines, is actually to affect the increase of the value of the occupation of the land in Dorking—that is purely a question of fact, with which we have nothing to do; and if, in fact, from either cause such increase takes place, I am not prepared to point out to the parish officers how it is to be ascertained or measured, or how it is to be distinguished from the general profits of the occupation in the parishes on the main line—that again is not within the province of this Court. It may well be that such increase may exist, and yet it may be so unimportant or so difficult to ascertain, that, as mathematical accuracy in a rate is never to be expected, it may be more prudent on the whole for the parish officers not to press it into the calculation.

\* Page 649.

† Pages 651, 657.

But, subject to the effect of these remarks,—which I make the more distinctly because I consider it of great importance for this Court always to abstain from expressing opinions on mere matters of fact, and to confine itself to laying down principles in questions of rating,—my answer to the second question is this : That the assessment may, and indeed should, be made with respect had both to the rent and to any increased value which the occupation in Dorking may have by increasing the traffic on the main line ; and I give the same answer in effect to the third question : That the respondents may and ought to take into consideration the value of the occupation as an integral part of the main line in both cases, as I have already stated, if they can ascertain that the value is increased thereby, and in proportion as they find it increased thereby. It will be observed that in both cases I slightly alter the wording of the questions to what I understand to be the meaning they were intended to convey. It has been objected that these principles, when applied to railways, may lead to double rating, because the same proprietor may be assessed in respect of the same profits in two parishes. I do not understand how the principle of rating can differ where there is one and the same occupier in two parishes, from where there are two or more occupiers. If the occupier be the same, the properties are necessarily different in respect of which he is rated ; and, for this purpose, he must be considered a distinct person in each parish in which he occupies. In each the overseers will rate him in respect of the property in their parish ; and they will estimate its value by what it produces, not merely there, but anywhere. If the profits of some other land in his occupation in another parish are mixed up with what the land in their parish produces, that ought to be the ground of a deduction from the assessment, and, if not made, the rate may be excessive in amount. It may be impossible to do this with mathematical accuracy ; but to do it is the business of the parish officers in the first instance—of the sessions in the second—but never of this Court. If, in the case of the New River, the parish officers of Islington should assess the company, looking only to total profits received in their parish, and making no separation of or allowance for the share which was properly referable to Amwell, and rateable there, they would overrate, and an appeal would lie ; but this would be no ground for diminishing the rate in Amwell, for the excess in Islington ought to have been appealed against : if it has been, we must presume redress has been afforded ; if it has not, the company has acquiesced : either way, the parish officers of Amwell cannot be affected by the course pursued by those of Islington. How can that case be distinguished from this ? The land and the water have a rateable value in Amwell, considered merely as such, but it is small ; they contribute, however, with the land and water elsewhere, to produce great profits, which are reaped, as it were, in Islington, and they are rated for the amount of this contribution. In Islington there are also land and water, and there the great mass of the profits is ostensibly produced ; but the overseers there ought to separate, from the portion on which they are to rate, the portions which are really earned in Amwell and the other parishes intervening. So, here, the land in Dorking has, per se, a rateable value ; but it is said to contribute to produce, with the other land in the other parishes, great profits at the London terminus of their main line ; and the occupier in Dorking has the contribution included in the rate of his land in Dorking, which, therefore, ought not to contribute to the rate in any other parish. Could the exact amount of that contribution be ascertained easily, not a doubt could exist that the rating was on a fair principle ; but the difficulty of ascertaining the amount surely can make no difference in the principle. To clear up that difficulty, whatever it may

The same profits may not be assessed in more than one parish

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amount to, is not the province of this Court, but of an accountant. Under these circumstances, therefore, it will be necessary, in my opinion, to send both rates to an arbitrator, to ascertain the proper amount according to the principles I have laid down."

Erle, J., dissented, and inasmuch as the law of the subject is still unsettled, we transcribe a portion of his judgment. The learned judge observed:—

"In this case, I consider the material facts to be, that one rate was made while the Reading and Reigate Railway was under lease, and the other after it was amalgamated with the South Eastern Railway; and the material question to be, what is the principle for ascertaining the rateable value of the portion of the line in the parish of Dorking for each rate? the parish contending that the rent of £1,000*l.* at the time of the first rate, and the amount of £1,000*l.* paid since the amalgamation, should be taken as the rateable value of the whole line, to be apportioned among the different parishes; the railway company contending that the net earnings of the portion of the line in the parish should be taken as the rateable value. As the rate since the amalgamation is the most important, being the guide for future rates, I take that first. By the amalgamation the Reading and Reigate line, which was a feeder, has become part of the South Eastern line, as much as if it formed part of the original construction; so that now either all is line or all is feeder, the amalgamation in this case being in no respect distinguishable from the amalgamation of the Newbury and Hungerford line with the Great Western. See *L. v. Great Western R. Co.* (a). There, the principle for rating a railway by taking the net profit of the whole line as the rateable value of the whole, and by apportioning that rateable value among the parishes in proportion to the net earnings in each parish, was sanctioned and acted upon. This principle was decided to be correct, after long consideration, in *R. v. London and Brighton*, *R. v. South Eastern*, and *R. v. Midland R. Co.* (c); and I extract the principle as expressed in each of those cases. In *R. v. Brighton*, the parish of Croydon claimed a right to rate the railway on the principle of parochial earnings, that is, at such a sum as a solvent tenant would pay as annual rent for the stations and portion of the railway within the parish, regard being had to the net revenue earned in the parish; and this principle was affirmed by the Court. In *R. v. South Eastern R. Co.*, the parish of Westbere claimed to rate a company for a portion of the branch to Ramsgate on the mileage principle of dividing the rateable value of the trunk and branches, according to the distance in each parish. It was found that the traffic upon the main or trunk line was greater than upon any of the branches. The company contended for the principle of parochial earnings, viz., that they ought to be rated at such a sum as a tenant might be expected to give as annual rent for that portion of the branch railway situate within the parish of Westbere, regard being had to the portion of profit earned by the portion of the railway within that parish; such rent being ascertained by taking the gross annual receipts from the portion of the railway situate in Westbere, such gross receipts being ascertained by taking a proportion of the fare paid by every passenger who has, during the year, been carried by the company over any portion of the line in Westbere, such proportion bearing the same ratio to the whole sum paid by such passenger as the distance in Westbere bears to the whole distance

(a) 15 Q. B. 1085, ante, p. 657.

(c) Ante, p. 619, note (f).

travelled by him ; and calculating goods on the same principle, and taking from such earnings the deductions allowed by the Parochial Assessment Act :—Held, that this principle of estimating the gross profits was correct, and that deductions were to be made on the parochial principle also. It is said in arguing (p) —Here is a parish, including a portion of a branch line, upon which it is found that the profits fall short of those earned on the main line. The profits on which the rate is to be calculated are those arising within the rating parish. The respondent parish has no right to any of the profits earned on the main line. The judgment of the Court supports this argument. In *R. v. Midland R. Co.*—the parish of Basford was rated on the mileage principle—the company contended that the rate ought to be estimated by reference solely to the net profits earned by the railway within that parish, without any reference to the net profits earned elsewhere, or to the rateable value of any portion of the railway lying in any other parish ; the judgment affirms this principle. In *R. v. Great Western R. Co. (q)*, the question was, how the *expenses* of a railway were to be apportioned ; and it was held, that they also, where they are local, are to be apportioned to the parish where they arise, and deducted from the gross earnings in that parish, calculated on the principle laid down in the foregoing cases. Nothing more than the gross earnings in the parish were allowed to the parish, although it was found that it was profitable to the company as proprietors of the entire Great Western Railway, by reason of the increased traffic brought thereby upon the main line, and the increased receipts upon that line between the London and Western termini of it. As each parish is held entitled to rate for the earnings therein (as, for example, Croydon, for all that is earned therein), it is clear that none of the other parishes on the line can rate for the tendency of the line situate in them to make the earnings in Croydon. The earning is profit, and if the whole profit in Croydon is rated there, and the tendency to create that profit is rated elsewhere, the same profit would be in effect rated twice, which is unlawful. Also, it is clear that no tendency to create profit is rateable ; no tenant would pay rent for a tendency to profit, unless it resulted in profit ; and certainly no tenant of the part of the line in Dorking would pay rent to increase the profit of some other tenant of some other part of the line, as was mentioned in the case of *R. v. Newmarket R. Co.* in this term (r). I have disposed of all that was material in the question submitted : but as the judges differ on the question, whether a railway can be rated for more than it produces in the parish, on account of its tendency to make profit elsewhere, which is expressed by a metaphor from feeding, and on the question whether, in a case for apportionment, one parish, in making its rate, can disregard the positions of other parishes within the apportionment ; and as a generality cannot be tested without a specific application, I suggest, if a case is again brought up relating to these points, it should state specifically what is the railway profit arising out of the parish which is liable to be rated within it."

In a case in which a branch, which produced no profit *per se*, but contributed to the profit of the main line, was leased to the main line at a fixed rent ; it was held, that the main line, as occupier of the branch, was liable to be rated not merely with respect to the earnings

Branch rateable as bringing profit to main line.  
Cannock case.

(p) 20 L. J., M. C. 140.

(q) 15 Q. B. 379, 1085 ; 21 L. J., M. C.

84.

(r) Ante, p. 662.

3. *Observations on decided Cases.*

Mode of rating branch with reference to main line fed thereby.  
*Haughley case.*

of the branch in the parish, but also in respect to its value as bringing profit to the main line (s).

But the proper mode of rating a branch line, with reference to the main line which it "feeds," is by no means precisely determined.

In *Great Eastern R. Co. v. Overseers of Haughley* (t), the Court of Queen's Bench held, that, in assessing such part of the railway as ran through the parish of Haughley, the ratable value was to be ascertained by taking the gross earnings in the parish, and making the usual deductions for working expenses, &c., applicable to that part of the railway; and that the fact that owing to the increased traffic the working expenses of the railway in other parishes, over which the traffic passing through Haughley passed, bore a less ratio to the earnings was not to be taken into account as lessening the average expenses over the whole transit, and so contributing to enhance the ratable value of the railway in the parish of Haughley. There the parish claimed to take into account the additional traffic beyond Haughley, not in the way of profits (as was done in the *Cannock case* (u)), which does not appear to have been referred to, but as diminishing the expenses in Haughley. It is difficult to see what difference this makes in principle; for, as has been well remarked, it comes to the same thing in the end, whether you add to the receipts or deduct from the expenses" (x). And the Court appear to have adopted this view in the *Llantrissant case*, for otherwise they could not have held, as they did, that that case was concluded by the principle of the *Haughley case* (y).

*Llantrissant case.*

In *Reg. v. Llantrissant Union* (z), the appellants, the Great Western R. Co. were the lessees of the Eley Valley Railway, which consisted of a main line and two branches, the branches being situate wholly, and the main line chiefly, in the parish of Llantrissant. Just outside the boundary of the parish the Eley Valley Railway formed a junction with the South Wales Railway, which was the property of the appellants. It was also connected with two other lines, and brought a considerable amount of traffic to the appellants' South Wales line. The question for the Court was, whether the value of the line to the appellants, as bringing traffic to the South Wales line, was to be taken into consideration in the assessment, in addition to the net profit as derived from the traffic passing through the parish of Llantrissant.

(s) *L. & N. W. R. Co. v. Churchwardens, &c. of Cannock*, 9 L. T. 325 (Nov. 1868).

(t) L. R., 1 Q. B. 666; 35 L. J., M. C. 229.

(u) *Ante*, p. 671.

(x) *Browne on Rating of Companies*, p. 158.

(y) In *L. v. L. & N. W. R. Co.*, p. 673,

post, Blackburn, J., stated that he was unable to see how the *Haughley case* bore upon the question then before the Court, but that was merely a suggestion thrown out in argument, which appears to have been satisfactorily answered. See L. R., 9 Q. 140.

(z) L. R., 4 Q. D. 354.

The Court answered this question in the negative, being of opinion that the question was decided in principle by the *Haughley* case, and confirmed an order of sessions reducing the rateable value (u).

In *Reg. v. London and North Western R. Co.* (b), the appellants, the railway company, had become possessed of a branch line consisting of two lines, one from Blotchley on the appellants' line to Bedford, and the other from Bedford to Cambridge; this branch line had become vested in the appellants by two Acts of Parliament, by which the shareholders in the companies which had made the line became stockholders in the appellants' whole undertaking, to an amount calculated as the expense of making the line. The branch line communicated with the lines of three other companies; and the appellants worked the line at very low fares in order to divert the traffic from the other lines on to their own line, so that the actual earnings of the branch line were very small. It was found as a fact that if the branch line were in the market, either of the three other companies would, in consequence of the traffic which it would bring to their line, be willing to acquire it upon the same terms in every respect as those upon which the appellants held it, and would work it in a similar manner. The respondents contended that this fact must be taken into consideration in estimating the rateable value of the branch line, and the Court held that this contention was right, and confirmed the rate.

*Bedford Union*  
(1890).

Blackburn, J., in giving judgment, said :—

“We must look at the general principle of rating embodied in the Parochial Assessment Act, and repeated in the Union Assessment Act, which is this : ‘The rateable value of the occupation of property shall be estimated at the rent which the property might reasonably be expected to produce if it were let from year to year, making certain deductions and certain allowances.’ It happens unfortunately in many of the cases that have arisen, especially in the case of railway and similar companies, that there is great difficulty in applying that principle; because from the nature of the thing the property in a particular

(a) *R. v. Llantrissant*, L. R., 4 Q. B. 354; *S. C.* nom. *G. W. R. Co. v. Pontypridd Union*, 38 L. J., M. C. 93. This decision seems to throw some doubt on the correctness of the decision in the *Cannock* case, for Mellor, J., in giving judgment, says : “I think it must be taken that the Lord Chief Justice, in the *Haughley* case, did not quite allude to the suggestion he threw out in the *Cannock* case.”

The *Haughley* case “seems to have settled the law after some aberrations from the ordinary rule in previous cases.” Per Hayes, J., 38 L. J., M. C. 96.

When the *Llantrissant* case was cited in argument in *R. v. L. & N. W. R. Co.*, as deciding that the parish was not entitled to take into consideration the value of the line

to the appellants as bringing traffic to their main line, Blackburn, J., is reported to have said (L. R., 9 Q. B. 141), “That is, if the above circumstance enhanced the value of the branch line, it was to be taken into account. The Court decided, rightly or wrongly, in the negative, that it did not enhance the value.” This dictum, however, which does not appear in the other reports of the case, does not appear accurately to represent the ground of the decision in the *Llantrissant* case. See per Mellor, J., in that case, L. R., 4 Q. B. 358.

(b) L. R., 9 Q. B. 134; 43 L. J., M. C. 81, nom. *R. v. Bedford Union Assessment Committee*. See also *L. & N. W. R. Co. v. Trillickworth Churchwardens*, 35 L. T. 327.



2. *Observations  
on decided Cases.*

*Mode of Rating  
Branch Line.*

*Bulford Union  
case.*

parish could not be lot by itself alone, and there is not the possibility of getting a tenant from year to year who would give an annual rent for it. Cases often happen of a link in a railway, which lies in a parish between two stations: there is one station in parish A., the next station in parish B., and between the two a bit of the line in parish C.; and no one could say, and it is not in the nature of things possible, that the link in parish C. could be let by itself. No one would take it. Nevertheless, in assessing it to the poor rate, you have to consider the complex matter, and ascertain as well as you can what it would let for; and to do this you have to ascertain what are the proper elements to take into consideration. Now there is one principle which is quite clear; in letting a thing from year to year, the rent would be regulated by two matters: on the one hand, by the benefit the tenant would be likely to derive from the occupation, because he would not give more than that; on the other hand, by the nature of the property, such as its local situation, or how many persons there are who could supply him with an equally eligible thing, and be willing to let it to him; for while he would not be willing to give more than he expected to make by it, he would not even give that if he could get a similar thing at a lower rent."

After referring to the principle as established ever since the *New River case* (c), that "The value of the occupation is to be considered as enhanced by the matters to which it would give facility," the learned judge proceeded:—

"In the present case we have the railway, and there seems to be no other similar railway as yet existing; and the number of tenants that would be found for it would be limited to those companies which are working the railways with which this particular line would communicate; and the company who occupy it would, as incident to that occupation, and consequent on their leasing it, have the power of influencing the traffic of their own railway, be the company the Great Northern, the London and North Western, the Midland, or the Great Eastern; and it is stated that, owing to this advantage attached to the occupation, each one of these companies would, as it is expressed, be willing to 'acquire it on the same terms as the appellants.' Now those terms are in perpetuity. If I took the view suggested by the appellants' counsel, that that statement means what they would give only to buy the railway in perpetuity and not that which they would be willing to pay for it from year to year supposing, contrary to fact and contrary to what is likely to happen, the appellant offered to lot it from year to year, I should say the parties had not given the Court the right test; because a company might well give for the railway in perpetuity a much larger sum in proportion than they would give for it from year to year. I do not think the statement can mean that; it must mean to state something that would be taken into account if the railway were lettable from year to year for occupation each year. If that be the meaning, I cannot help thinking that the rent to be obtained for lotting it would be enhanced by the fact that there were four competitors who would be willing to take it. I do not think that the whole of what would be given as rent from year to year is necessarily to be taken, still less what it would let for in perpetuity; but I think the fact that there are those competitors who would be willing to bid for it is an element to be taken into consideration in estimating the annual value. In the present case it is sufficient to say that this fact is an element to be taken into

consideration. Supposing the railway were to be put up to be let from year to year, what rent would be actually given? That is what the sessions would have to get at. It would be a difficult question to decide, but I do not think we can disregard the fact that there are four competitors who would bid against each other."

And Quain, J., after adverting to the fact that the other companies would compete for the line, proceeds as follows:—

"Thus, I understand, the value of the occupation would be, not merely what the railway earns in the particular parish, but something more, some enhanced value by reason of its facility of communication with other railways. The test is, what would the line be reasonably expected to let it for from year to year? And, as I understand it, the *Dorking case* (d) distinctly decides that, in ascertaining that, you may take into consideration not only the actual earnings in the parish, but also what further profit the tenant would make by reason of the occupation, although that profit be earned elsewhere."

Notwithstanding the remarks attributed to Blackburn, J., in the course of the argument, which have already been considered,\* it seems very difficult to reconcile this decision, and a number of the earlier cases, with the *Haughley case*† and the *Llantrissant case*‡, and it will probably have to be decided hereafter which class of cases is to be followed. It is submitted that the decision in *R. v. London and North Western R. Co.*§ is more consistent with sound principle, as well as with the weight of authority in the earlier cases (e).

Where a railway company were authorized to levy a particular toll but did not levy it, because, if they did, the carriage of goods in respect of which it was leviable would in their opinion be altogether lost, it was held that they were not rateable in respect of those tolls (f).

Where by an arrangement between the North London R. Co. and the Blackwall R. Co., passengers were booked through and carried from stations on the former to stations on the latter line, the North London R. Co. paying over out of the whole fare charged a fixed and reasonable sum to the Blackwall R. Co. for every passenger so carried; it was held that, in ascertaining the rateable value of a part of the North London R. Co.'s line in a particular parish, the aggregate of the sums so paid over to the Blackwall Co. must be thrown altogether out of consideration (g).

If running powers be granted for an annual payment fixed by statute, the rateable value cannot exceed such payment although the traffic passed over the line by virtue of the running powers bring in

(d) *R. v. S. E. R. Co.*, ante, p. 665.

(e) See the same conclusion arrived at in *Browne on Rating of Companies*, pp. 178—180, after a very full consideration of the question of contributive value, pp. 129

—180.

(f) *R. v. Stockton and Darlington R. Co.*, 3 L. T. 122 (May, 1883).

(g) *R. v. St. Pancras*, 32 L. J., M. C. 116; 3 B. & S. 810.

\* Page 673.

† Page 672.

‡ Page 672.

§ Page 673.

Authorized toll not charged, not rateable.

*R. v. Stockton and Darlington R. Co.*

Rateable value where passengers booked through.  
*R. v. St. Pancras*.

Rateable value where running powers granted for fixed annual payment.  
*Attorcheson v. The Liverpool Committee*

2. Objections  
on United Cases.

a greater amount than such annual payment. This was held by the Court of Appeal in *Altrincham Union v. Cheshire Lines Committee* (h), in which the line rated was run over for a payment commuted under a special act at 2,500*l.* a year and the rateable value had been put by the Assessment Committee and Quarter Sessions at about 6,000*l.* a year.

3. How to rate a  
Railway.

*3. How to rate a Railway.*

We have now to consider whether the foregoing decisions do not afford some useful practical rules for rating a railway (i).

Ascertainment  
of gross receipts  
in particular  
parish.

It having been decided, as we have seen (j), that the parochial principle is applicable to railway rating, it is necessary, as a preliminary step, to ascertain the amount of the gross receipts of the company earned in the parish which is about to levy the rate. The company's books will always furnish this information, and upon application being made by the parish officers, it is usual to give every facility for obtaining it (k). It may appear to be difficult to ascertain the gross receipts in a particular parish, but as the accounts are usually well kept, and invariably show what the traffic is to and from every station on the railway, a simple sum in arithmetic will work out the problem. Let us suppose, by way of illustration, that the rate is to be made for the parish of *Fairmile*, over which the railway runs for a distance of one mile, there being no station within the parish. Under these circumstances, it is obvious that all the passengers and other traffic which have passed from either of the stations on the railway beyond Fairmile to any other station below it, or *vice versa*, must have gone over the portion of the line situate in Fairmile. The quantities of this traffic, and the charges made in respect of it, must therefore be ascertained, and then it is only necessary to calculate the proportionate part of every fare and other receipts for traffic, which ought to be apportioned to this one mile, and the result shows the amount of the gross earnings in the parish. Nor is the calculation a difficult one. For instance, if the whole railway were fifty miles in length, one fiftieth of every through passenger's fare would

(h) *Altrincham Union v. Cheshire Lines Committee*, L. R., 15 Q. B. D. 597.

(i) Mr. Cripps, in a valuable pamphlet, entitled "How to Rate a Railway," published by Maxwell, considers this subject at considerable length, and much valuable information is imparted, which has proved of great service in the compilation of the above remarks. Another able contribution

on the difficult subject of "Contributive Value," by Mr. H. Castle, Civil Engineer, published by Maxwell, may be consulted with advantage, as also may Browne's "Treatise on the Law of Rating Hereditaments in the Occupation of Companies" (A.D. 1875).

(j) See ante, p. 648.

(k) See ante, p. 642.

represent the portion which was received in respect of Fairmile ; and in like manner every other fare which has been received for other than through passengers will be subject to a proportionate division according to the number of miles travelled. And by adopting a similar calculation for goods traffic, the gross earnings in every parish may be very accurately ascertained.

Having then ascertained the gross earnings in the parish, we must next consider what deductions ought to be made. One class of these deductions may be conveniently arranged under the nine following heads :—

Ascertainment  
and heads of  
deductions.

1. For maintenance of the permanent way.
2. Reproduction of the permanent way.
3. Locomotive and carriage account, viz., coals, coke, repairs to engines and carriages, wages to guards, firemen and drivers, oil, tallow and other incidental expenses.
4. Station and carrying charges, including clerks, porters, watchmen, police, porters, clothing, gas, tickets.
5. Direction and office expenses, including payments to directors, superintendents of departments, advertising, printing, stationery, travelling expenses and law charges.
6. Rent of stations, and repairs of stations and buildings.
7. Compensation\* fund to meet costs of accidents under Lord Campbell's Act, and other casual losses of a like nature.
8. Rates and taxes.
9. Government duty payable on passengers.

These items of allowance need not necessarily be divided into precisely the foregoing heads, for if the mode in which the accounts of the company are kept, or any other circumstance, should render it desirable to classify them in a different order or arrangement, any other plan may be followed, so that the desired result be ultimately attained. Let us then examine each item in some detail.

1. Maintenance of permanent way. This deduction should be the average annual cost incurred in keeping the line of railway in Fairmile in repair, including the ballasting, fencing, draining and other similar expenses. This item of allowance has been generally ascertained without difficulty. In many cases, it has been ascertained at the quarter sessions that certain districts of the line are maintained under yearly contracts, at a certain specified sum per mile; and in such cases the contract price has been usually adopted. It may undoubtedly happen, in some rare cases, that the cost of keeping a particular portion of the railway in repair is greater than the ordinary and average cost of the line, and in strictness this ought to be taken into account. But as all parts of the line are necessarily used for the passage of the locomotive engine and carriages, both before and after

Maintenance of  
way

3. *How to rate a Railway.*Deduct from —  
continued.

they pass through the parish which enforces the rate, and as every portion of the line is mutually dependent upon the other portions for the creation of the entire earnings, it would probably require strong evidence to induce a Court of Quarter Sessions to refuse to adopt a mileage division of the costs of maintaining the way. Any excess of expenditure on a particular part of the line would probably arise rather from the nature of the soil over which it is carried than from any excess of traffic: and, on the other hand, if it be clearly shown that the increased expenditure arises from the latter cause, the parish authorities will be entitled to the benefit which arises from the larger amount of the gross receipts; and they may, therefore, in such cases, properly permit an additional allowance to be made for the maintenance of the permanent way.

Reproduction  
of way.

2. Reproduction of the permanent way. Besides the allowance for the mere actual annual repairs and maintenance of the way, the rule has been laid down in several cases (l), that an additional allowance should be made for the renewal and reproduction of the rails, and framework, or sleepers, of the railway. This seems to be one of that class of deductions falling under the Parochial Assessment Act, which require a deduction from the gross rental in respect of the probable average annual costs of the repairs, and other expenses necessary to maintain the rated hereditament in a state to command the net rental. The facts stated in the decided cases show that although, by annual repairs and partial renewals, the rails and sleepers of a railway are maintained in an efficient state, the necessity of a fundamental renewal and reproduction will nevertheless arise after a certain number of years. It is therefore proper to ascertain, on a mileage calculation, what sum set aside annually will accumulate to such a fund as will be sufficient to make the renewal when the period arrives; and it is now also firmly established that the company are entitled to make this deduction, although they do not, year by year, actually set aside any sum of money for this purpose. The contest which arises under this head of deduction usually relates to the number of years which may be expected to elapse before the renewal of the rails and materials will be required. This will obviously vary according to the amount of the traffic, the nature of the soil, and other similar circumstances, and must be treated as a question of fact to be determined by the evidence of competent witnesses.

Locomotive  
charges.

3. The locomotive account. The annual cost incurred by the various items of expenditure enumerated in the above account (m), for the whole line of railway, is readily ascertained when the accounts of

(l) Ante, p. 652.

(m) Ante, p. 677

a company are properly kept; and then by a simple process, which we shall endeavour to explain, the sum to be deducted in respect of the particular parish may be accurately ascertained. Suppose, for instance, that the total annual cost is found to be 5,000*l*. We proceed then to ascertain the number of miles run by all the locomotive engines during the year, over the whole line of railway, and we find the amount to be 100,000 miles. This being ascertained, a simple sum in arithmetic shows that for every mile run, a cost of one shilling has been incurred, and we come to the conclusion that this is the exact average cost of running a locomotive engine over one mile of railway. We again resort to the books of the company, and find that the locomotive engines passed through Fairmile, our supposed particular parish, on the up or down line, five thousand times during the year. We cannot, therefore, or if we conclude that the deduction for locomotive expenses should be five thousand shillings or 250*l*. But it may be objected that this mode of arriving at the cost of the locomotive power would be erroneous, if the parish of Fairmile happened to be situate on a branch railway, because it is well known that the cost of locomotive power, per mile run, is usually much greater on a branch line than on the trunk. This arises from the circumstance that trains pass over a branch railway less frequently than over the main line; and an engine placed on the former is subjected to long detentions at the junction, waiting to take her journey, whilst during the same period of time an engine on the main line performs a long journey without detention of any kind. The daily cost of two engines thus engaged may be nearly the same, but one may have travelled two hundred miles daily, whilst the other has not performed more than two short journeys on the branch line.

All the cases show that deductions must be made upon the parochial principle, just as the gross profits are ascertained, and it seems at first sight to be reasonable that the deductions should be ascertained on the principle of allowing all charges and expenses arising locally, which are necessary for keeping the subject of the assessment at the value which is made the measure of that assessment (*n*). On the other hand, the parish authorities, on a branch line, may justly say, that it is unfair to adopt the higher rate of expenses, caused by working the branch line, when (as is generally the case), the branch is chiefly worked as being a feeder of the traffic to the main line; and here it is, without doubt, that the practical difficulty arises, which led to a difference of opinion in the Court of

(*n*) See *Great Western case* (No. 2), p. 665, particularly the remarks made by ante, p. 657; *E. v. N. E. R. Co.*, ante, Erle, J.

3. *How to rate a  
the railway.*Deductions—  
continued.Locomotive  
Charges.

Queen's Bench (o). Upon that occasion, the decision of the Court is, as we have already seen, that if the value of the branch be enhanced by its contributing traffic to other parts of the railway, such increased value may be properly taken into consideration; but it will probably be found, in most instances, that the difficulty of ascertaining this increased value will be so great as to prevent parochial officers from availing themselves of the strict letter of the law. Lord Campbell, C. J., says,—

“In many cases the supposed advantage derived by a railway company from a portion of a railway in a particular parish, bringing passengers and goods to another portion out of the parish, may be almost inappreciable; and I would earnestly dissuade parishes from ever making any claim under this head, unless where upon clear evidence the claim can, in point of fact, be established.”

There is also much force in the remark made by Erle, J., that after an amalgamation of a branch with a main line of railway, all ought to be considered as line, or all as feeder (p); and parish officers will probably find it difficult to comply with the request made by the same learned judge, who concluded his judgment by saying,—

“As the judges differ on the question, whether a railway can be rated for more than it produces in the parish, on account of its tendency to make profit elsewhere, which is expressed by a metaphor from feeding, and on the question whether, in a case for apportionment, one parish in making its rate can disregard the positions of other parishes within the apportionment, and as a generality cannot be tested without a specific application, I suggest, if a case is again brought up relating to these points, it should state specifically what is the railway profit arising out of the parish which is liable to be rated within it.”

Under these circumstances, therefore, we may perhaps safely arrive at the conclusion, that if, by reason of the difficulties which surround the attempt, no such increased value is attempted to be attached to the branch line in making the assessment, it will be only just to allow the parish officers to make the deductions, in respect of the locomotive power, on its average cost per mile, throughout the whole line of railway, notwithstanding the actual cost on the branch may

(o) Much has been said and written upon this subject, but the following remark may dispose of the matter satisfactorily, so far as the facts are concerned. Why does it answer the purpose of a railway company to work a branch line, when the expenses are equal to, or even exceed, the receipts? The answer is obvious. On a main line of railway, trains are running to and from the various termini at a certain cost, and by means of branch railways, additional traffic is brought to join these trains, without material increase of cost being occasioned

on the main line: thus the passenger who contributed nothing to the profits whilst he travelled on the branch line, does contribute to the amount of profits as soon as he is brought to and traverses the main line. Mr. Justice Erle's significant suggestion (ante, p. 670), that “all is line or all is feeder,” would seem to lead to the conclusion that a branch may be conveniently assessed upon the principle laid down in the text.

(p) Ante, p. 670.

be considerably higher. And, indeed, the same liberality should be exercised towards the parishes over which such a branch line of railway runs, in making all similar calculations; for as many such lines are worked with little or no profit, it would otherwise follow that they yield no rateable value whatever (g).

As a general rule, in making deductions, Lord Campbell's remarks (r) may well be adopted. His lordship said,—

General rule as to deductions.

"Of these outgoings of a railway, some are general, having no more connexion with or influence on one part of the whole line than on any other, incurred for the sake of the whole line, and contributing to the profits everywhere. Of course these must be distributed, and to every mile must be apportioned some share, on whatever principle the apportionment is to be settled. Some, again, seem purely local; a tunnel here, an inclined plane there (we purposely mention striking and definite peculiarities), yet even these are contributing to the earnings everywhere; without these the traffic, on either side, could have no existence. It would be wrong to set those wholly and exclusively against the receipts earned in the same part of the line. We need not dwell on this, because in principle some distribution is on all hands agreed to be necessary; the only difficulty is, in determining what is to be adopted for making it justly,—a difficulty, we believe, actually insurmountable in fact, if strict mathematical accuracy were insisted on. It is our business, however, only to lay down the general rule, and in applying it, much must be left not only to the experience and acuteness, but also to the good sense and good faith and candour of the parties concerned, whose interests will be found in the end to be best consulted by this mode of dealing."

It has been held, that, in making deductions in respect of repairs and renovation of rolling stock, an arbitrator was not wrong in proceeding upon the supposition that the hypothetical tenant would make his calculations as to the amount of rent, under the assurance that the stock would be replaced at the end of what may be called its natural life, and was not bound to assume that his tenancy would be broken up at the end of the year (t).

Repair of rolling stock.

4. Station and carrying charges. Under this head of deduction, the items of expenditure are embraced which we have already adverted to (u). It needs no argument to show that all the stations on a line of railway contribute, in some degree, to the realizing of the

Station and carrying charges.

(g) And see ante, p. 671.

(r) Ante, p. 667, in *R. v. South Eastern R. Co.*

(t) *Great Eastern R. Co. v. Houghley*, 35 L. J., M. C. 229; 7 B. & S. 624.

(u) Ante, p. 677. And see also *R. v. North Staffordshire R. Co.*, post, p. 681. "Terminals," i.e., certain allowances which (where the clearing-house system is in force) are made to a company owning a station by way of remuneration for the accommodation afforded in receiving, loading, and

unloading, despatching and delivering goods either taken in or given out at the station, are general earnings; and the expenses incurred in earning them are general expenses of the line, and are to be treated in the same way as any other part of the gross receipts and outgoings. *R. v. Eastern Counties R. Co.*, 4 B. & S. 58; 32 L. J., M. C. 171. And see a case decided on reference to the Railway Commissioners, *N. & L. R. Co. and Trent, &c., R. Co. v. Outstar Union*, 2 Nev. & Mac. 53.



8. *How to rate a  
Railway.*

Deductions—  
continued.

Station and  
Carrying Charges  
—continued

earnings acquired in every parish on the line. These stations must be maintained with a sufficient staff of officers and servants for the general purposes of the undertaking, and the charges for passengers and other traffic are made in respect of the accommodation furnished at the stations, as well as for the transit on the line. How, then, is this deduction to be apportioned to a particular parish? This will clearly appear if we imagine that there are only two stations on the railway, one at each terminus, and that Fairmile, having no station, is situate in the centre of the line. All the traffic which passes through that parish would, under such circumstances, be taken up and put down at one of these termini, and it is evident that the cost of maintaining the two stations would be properly ascertained by an equal mileage division, calculated in respect of the whole line. Thus, if the annual cost of each station be 1,000*l.*, and the whole line be fifty miles in length, the deduction on a mileage calculation would be at the rate of 40*l.* per mile. So far, this appears to be a simple mode of apportioning the cost of the stations; but it will be necessary to extend our inquiries to a more complicated state of circumstances, for there are usually many stations placed on the line of a railway, some of them first class stations, maintained at a great expense, and the others of a subordinate description. In such cases we have still to carry out the principle already indicated. In the simple case, the stations contribute to the accommodation of the transit over Fairmile, equally with every other part of the line, and an equal mileage division is made. In the more complex state of circumstances, they may and usually do contribute, unequally, to the convenience of the transit over various parts of the line, and therefore it becomes necessary to ascertain the extent of the accommodation afforded by each station to Fairmile. Nor is this a difficult task. It is only necessary to ascertain the expenses of maintaining each station; then to find out the gross receipts in respect of the traffic using each station; and as the previous inquiry made, as we have already shown, to ascertain the gross receipts in Fairmile, will have furnished information showing what stations have been used for the purposes of the Fairmile traffic, it is presumed that a skilled accountant can arrive at a very near approximation of the proper deductions under this head. It may, perhaps, assist our inquiries, if we notice at this place that the expense attending a stationary engine, or any other similarly extraordinary expenditure at any point of the line of railway, should be apportioned upon precisely the same principle as the station expenses. The total cost of maintaining the engine being first ascertained, it should be divided over those parts of the line whose traffic it maintains, in proportions depending upon the quantity of traffic in every parish which has been so maintained.

5. Direction (x) and office expenses. These are usually apportioned upon a mileage calculation over the whole railway, and although in some extreme cases this may be open to objection, especially with regard to law charges, it will probably be found to be a sufficient approximation to accuracy to make the deduction upon that principle.

Direction and office expenses.

6. In all the cases the rent of the stations (y) have been allowed as a separate item of deduction, with the approval of the Court of Queen's Bench.

Rent of stations.

7. Compensation fund. This is a deduction the company are clearly entitled to make, and it is usually made in the same proportions as the direction and office expenses.

Compensation fund.

8 and 9. Rates, taxes, and government duty. These are also deductions upon which no questions are likely to arise. Income tax, which a tenant would have to pay on his net profits after payment of rent, is not an allowable deduction (z).

Rates and taxes.

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When all the above-mentioned deductions have been made from the gross receipts, the sum which remains does not represent the true rateable value of the railway, because no allowance has yet been made in respect of the capital which a tenant must invest for the purpose of working the line of railway. Locomotive engines of an expensive description, numerous carriages, waggons and trucks, and much valuable machinery, must be purchased for the purposes of the undertaking, and some amount of ready money has also to be kept as a floating balance for carrying on the trade of a carrier. There is not much practical difficulty in ascertaining the quantity of rolling and other stock which is required for the proper working of a railway. It depends of course upon the amount of the traffic, the number of the branches, and other local circumstances peculiar to the line, and is not usually left as a matter of speculation, because the existing stock affords a good test of the quantity actually required. Again, we meet with the difficulty suggested by drawing the distinction between branch and main line; and, for the reasons already mentioned, we presume that a comparatively smaller quantity of rolling stock should be assigned to a branch line than that which is assumed to be necessary for working the main line of the railway, where the chief traffic is attracted. Having then ascertained the quantity of stock which is necessary, the proper course seems to be to ascertain

ALLOWANCE IN RESPECT OF CAPITAL AND PROFITS.

(x) That a personal remuneration to directors is an allowable deduction, see *R. v. Southampton Dock Co.*, 11 Q. B. D. 587.

(y) As to the proper mode of valuing stations, see post, p. 685.  
(z) *R. v. Southampton Dock Co.*, 14 Q. B. 587.

8. *How to rate a Railway.*

Allowances in respect of Capital and Profits — continued.

what amount of capital would be required to purchase or provide it, at the time the rate is made. The original cost price of it would probably be too high a calculation, because it would probably be depreciated in value since it was placed on the line. The profits must, therefore, be calculated on the actual value of the stock, for it cannot reasonably be supposed that if the company were about to give up the undertaking, they would not be willing to part with their stock at its actual value, or if they refused to do so, the incoming tenant could not procure other stock of an equally efficient character at its real value to supply the deficiency (a). The necessary capital required for the purpose we have enumerated being thus ascertained and a fair proportion assigned to Fairmile, the ordinary course is to allow five per cent. for ordinary interest of the money, and then to allow a certain undefinable percentage to represent tenants' profits. This allowance has ranged in different cases from ten to thirty per cent. on the required capital. A further allowance for the annual depreciation of stock, after ordinary repairs have been allowed for, is also usually made. This varies from five to twelve-and-a-half per cent. according to the circumstances of each particular case, or the peculiar opinion entertained by justices. It is, however, perfectly obvious that the three last-mentioned items of allowance resolve themselves under one general head, and it would probably be the most just and equitable course to treat the interest of capital, the profits of trade (acquired in great part by the use of personal chattels), and the allowance in respect of the depreciation of stock, under one general allowance, which ought to be ample and sufficient, so that the residue should fairly represent the value of the land alone on which the railway has been constructed.

*R. v. North Staffordshire R. Co.*

In *R. v. North Staffordshire R. Co. (c)*, which may conveniently be noticed here, four questions arose:—*First*, whether the percentage amount to be allowed for interest on capital and tenants' profits is to be calculated upon the capital invested in the rolling stock taken at its *cost price*, or upon the depreciated value of the rolling stock as estimated at the time when the rates were made, or at any other time. *Secondly*, whether the company were entitled to a deduction for interest on capital and tenants' profits upon a sum of 52,950*l.*, an additional amount of capital invested in turntables, cranes, weighing-machines, stationary steam engines, lathes, electric telegraph and apparatus, office and station furniture, and gas works, or upon any and what portion of such items; and if so, whether upon the sums originally invested in the said plant, or upon the depreciated value of the same estimated at the time when the rates were made, or at any

(a) Per Cockburn, C. J., in *R. v. North Staffordshire R. Co.*, *infra*.

(c) 30 L. J., M. C. 68; 3 E. & E. 392.

other time ; or how otherwise a deduction, if any, should be made in respect of the last-mentioned plant, or any part thereof. *Thirdly*, whether the company were entitled to a further reduction for interest and tenants' profits, or either, upon certain floating capital : and *Fourthly*, whether the deduction to be allowed in respect of the stations, buildings and sidings along the line of railway ought to be ascertained, by taking the rateable value at which the same were assessed to the relief of the poor, or by allowing 6½ per cent. upon the original cost of production, as contended for by the company, or how otherwise a reduction should be made in respect of the said stations, buildings and sidings. In delivering the judgment of the Court of Queen's Bench, Cockburn, C. J., said they were of opinion upon the first point that the allowance must be made with reference to the *actual*, and not to the original value ; the point having already been decided in *R. v. Great Western R. Co.* (No. 1),\* in which decision they concurred. And his Lordship proceeded,—

\* Page 661.

“ In addition to the reasons given in the judgment of the Court in that case it may be observed, that, as under the Parochial Assessment Act tenants' profits upon stock must necessarily be calculated with a view to their deduction from the gross earnings, in order to ascertain what a tenant would give for the entire property, nothing could be more inconvenient than that a different principle should prevail in calculating the profits in the two cases.

“ Now the question, when considered under the Parochial Assessment Act, must be looked at, not with reference to the railway company, who may have expended on the purchase of the stock a much larger sum than such stock would now realize, but with reference to an incoming tenant, and the amount of capital which such tenant would have to lay out in the purchase of the rolling stock necessary to carry on the undertaking. It is obvious that what it would be worth the while of a person or company about to embark in a commercial undertaking to give as rent for the premises in which it was to be carried on, would depend on the amount to be deducted, in addition to repairs and other necessary outgoings, from the gross earnings in respect of the profits due to the capital to be employed in the concern. But it is plain, that a tenant would calculate such profits on the amount of capital actually required to be expended on the stock, not on what may have been the value of such stock at some other time, or in other hands. Now it must be assumed that the stock, in its existing condition, is sufficiently effective to produce the earnings which, after the necessary deductions, constitute the improved value of the railway ; and it cannot reasonably be supposed that if the company were about to give up the undertaking, they would not be willing to part with their stock at its actual value, or that, if they refused to do so, the incoming tenant could not procure other stock of an equally efficient character at its real value to supply the deficiency. In estimating, therefore, under the 6 & 7 Will. 4, c. 96, what a tenant would pay, the profits must be calculated on the actual value of the stock. It cannot be supposed that, in exempting profits under 3 & 4 Vict. c. 80, a different principle of calculation was intended to be acted on.

“ The *second* question is, whether the company are entitled to a deduction in respect of various articles therein specified, being things necessary for carrying  
Furniture, station furniture, &c.

3. *How to rate a Railway.*

Allowances in respect of Capital and Profits—*continued.*

*L. v. N. Staffordshire R. Co.*

on the business of the company. The articles to which such a question may have reference may be divided into three classes: first, things moveable, such as office and station furniture; secondly, things so attached to the freehold as to become part of it; and thirdly, things which, though capable of being removed, are yet so far attached as that it is intended they shall remain permanently connected with the railway or the premises used with it, and remain permanent appendages to it as essential to its working. It is clear that, in respect of the first class of articles, a deduction should be allowed. It is equally clear that no deduction should be allowed as to the second. As to the third, the question is finally settled by the decision of this Court in *L. v. Southampton Dock Co. (d)*.

Floating capital.

"The *third* question, whether the company are entitled to a deduction in respect to the floating capital therein referred to, is one of considerable nicety, and which, as it appears to us, must depend on whether on the whole capital employed a greater delay occurs in realizing the returns than is ordinarily incidental to the employment of capital (e). No doubt, as the rent which the imaginary tenant contemplated by the Parochial Assessment Act could afford to pay, would be the difference between the gross earnings (after the necessary deductions) and the amount of profits due (reference being had to the nature of the undertaking) on the capital employed, whatever tends to diminish such profits must go, *pro tanto*, to diminish the rent. Any delay in realizing the profits beyond such as is generally incidental to the ordinary employment of capital, may therefore (as it must be presumed that it would be taken into account by the tenant) be fairly taken into account in determining the rateable value. On the other hand, it must be observed, that, as a very large proportion of the earnings of a railway company is of a ready-money character, it may well be that when the whole of the capital and of the earnings are taken into account, the profits on the whole capital may be realized in a shorter time in this species of undertaking than on the average of commercial enterprises. If this should be the case, the delay in realizing the profits which might arise as to a part of the capital might well be considered to be compensated by the more than ordinary quickness of the return on the rest. We have no means before us of determining the question with reference to this view of the case. We can do no more than point out the principle by which we think it must be determined.

Stations &c.

"As regards the *fourth* question, we are of opinion that the deduction to be allowed in respect of stations, buildings and sidings must be calculated on the actual value at which they ought to be assessed, and not on the original cost of construction."

Rating of buildings.

With regard to the rating of buildings, it is to be observed that the station-houses, warehouses, offices, repairing works, and any other buildings used for the purposes of the railway, are rateable in the respective parishes in which they are situate, and the assessment

(d) That no deduction should be allowed: 11 Q. B. 587. Lord Campbell, C. J., in that case said,—“This is a rate upon buildings to which machinery is attached for the purposes of trade, and it has been solemnly decided that such real property ought to be assessed according to its *existing value as combined with the machinery*, without considering whether the machinery be real or personal property, or whether it be liable or not to distress or

seizure under a fi. fa., or whether it would go to the heir or executor, or at the expiration of a lease to the landlord or tenant. *L. v. Birmingham and Staffordshire Gas Co.*, 6 A. & E. 631; *L. v. Guest*, 7 A. & E. 951. See also *R. v. Lec*, 35 L. J., M. C. 105; 7 D. & S. 188.

(e) And see a case referred to the Railway Commissioners, *L. & N. W. R. Co. v. Wigan Union*, Nov. 24th, 1875.

should be made upon their net annual value, ascertained according to the provisions of the Parochial Assessment Act (f).

These buildings ought to be valued as fixed property, deriving some additional value from their capacity of being used as part of the railway works, a rule which in practice it is found not difficult to apply, though it is not theoretically very definite (g).

The occupiers are liable to be rated in respect of the full rateable value of the property, without regard to the amount of benefit which they themselves derive from that occupation. Therefore, in *R. v. Rhymney R. Co.* (h), the railway company, as lessees of docks and wharves, were held liable to be assessed in respect of the full rateable value of the premises, including certain wharfage dues which were reserved to the landlords and were payable to them direct.

Rate to be on full rateable value.  
*R. v. Rhymney R. Co.*

The occupier is the person to be rated (i); if a railway company demise buildings to a tenant, giving him the exclusive possession and occupation, the tenant is rateable and the railway company is exempt. But if the company allow their buildings to be used under such circumstances that there is no demise, but merely a licence to use and occupy the buildings as an easement, the company remain liable to be rated as occupiers, as is shown by the following decisions:

Exemption from rateability as occupiers by demise, but not by licence to use.

In *R. v. Fletton* (k), the appellants, the Eastern Counties R. Co. who were sole owners of a station in 1848, entered into an arrangement by deed with the London and North Western R. Co., by which the latter were for 999 years to have the joint use of part of the station and the exclusive use of another part on certain terms. In consequence of a subsequent falling off in their traffic, the station became of less value to the L. & N. W. R. Co., and the real present value to them was much below the sum actually paid by them to the Eastern Counties R. Co. under the deed. It was held, upon a case in which it was to be taken as a fact that the Eastern Counties R. Co. were the persons rateable for the whole occupation of the station, that they were assessable on the full amount which they received from the L. & N. W. R. Co. And it was afterwards held that the Eastern R. Co. were rateable as the sole occupiers (under the terms of the deed) of so much of the station as was not in the exclusive occupation of the L. & N. W. R. Co.; and that, in rating them for such occupation, the sum paid by the L. & N. W. R. Co. must be considered as part of the profits (l).

*R. v. Fletton.*

*R. v. Lord Sharncliffe.*

(f) 6 & 7 Will. 4, c. 96, ante, p. 641.  
(g) See *R. v. Sheffield United Gaslight Co.*, 4 B. & S. 185; 32 L. J., M. C. 169, per Blackburn, J., delivering the judgment of the Court; and *R. v. Mile End Old Town*, 10 Q. B. 208; 18 L. J., M. C. 184; *R. v. West Middlesex Waterworks Co.*,

1 E. & E. 716; 28 L. J., M. C. 135.  
(h) L. R., 4 Q. B. 276; 10 B. & S. 193.  
(i) 43 Eliz. c. 2, s. 1, ante, p. 611.  
(k) 30 L. J., M. C. 89.  
(l) *R. v. Lord Sharncliffe*, 33 L. J., M. C. 5.

3. *How to rate a Railway.*

*L. & N. W. R. Co.  
v. Buckmaster.*

Permission to  
use stables.

In *Buckmaster's Case* (*m*), the company owned stables within the gates shutting in their station premises from the public road, and the stables were used by certain coal owners under an agreement, by which they, "in consideration of the railway company permitting them to occupy and use a stable for four horses," agreed to pay a monthly rent, to observe and be bound by the bye-laws which the company should issue, and to give up possession at a month's notice, to be given at any time; the company had not exercised any control over or used the stables during the currency of the agreement, and none of the bye-laws applied to the stables. The Court of Queen's Bench held that the railway company were rightly rated as occupiers, on the ground that the agreement was not a demise of the stables, but merely a licence to use them (*m*). This judgment was affirmed in the Exchequer Chamber, the Court being equally divided. Three of the judges took the same view as that taken by the Court of Queen's Bench, while the other three thought that the agreement amounted to a demise (*n*).

4. *Quarter Rating under Public Health Act.*4. *Quarter Rating under the Public Health Act, &c.*

The special provisions (*o*) affecting railway companies inserted in the Public Health Act of 1848 and the Local Government Act of 1858 reappear in the Public Health Act of 1875, and decisions of importance upon the former statutes are still applicable (*p*).

The former statutes (11 & 12 Vict. c. 63, s. 88, and 21 & 22 Vict. c. 98, s. 55) provided that the occupier of any land used "as a railway constructed under the powers of any Act of Parliament for public conveyance," should be assessed to the rates levied for the purposes of those statutes, "in the proportion of one-fourth part only of the net annual value." It was held that a railway constructed by a dock company in connection with their docks, and joining another railway,

(*m*) *L. & N. W. R. Co. v. Buckmaster*, L. R., 10 Q. B. 70, 444.

(*n*) *L. R.*, 10 Q. B. 444; 44 L. J., M. C. 180; 33 L. T. 329.

(*o*) With respect to the liability of a company to pay local rates, it appeared in a decided case that they had built bridges over their line of railway, upon land conveyed to them in fee, but with a reservation of the use of the bridges. There were walls on each side of the bridges. The commissioners for paving, &c., paved the road over the bridges, and it was held that the company were liable to be rated

for the walls of the sides of the bridges under 57 Geo. 3, c. xxix, s. 80, the walls of the bridges being "dead walls" within the meaning of the act. Also, by Jervis, C. J., that they were liable under the words "void spaces;" and by Maule, J., that they were liable for them as "public buildings." *Arnall v. L. & N. W. R. Co.*, 12 C. B. 697. See *Same v. Reynold's Canal Co.*, 14 C. B. 561.

(*p*) The Act of 1875 (38 & 39 Vict. c. 55) repeals the Acts of 1848 and 1858, but by sect. 211 re-enacts the sections of those acts referred to in the text.

under an act by which the company was bound to complete the railway for public use, came within the exemption, although not constructed to carry passengers (g); but that the exemption applied only to the line of railway, including the sidings, turn-tables and platforms, but not to stations, warehouses and buildings auxiliary to, and necessary for the working of, the railway (r). Where a railway, at first constructed without parliamentary powers, was afterwards sold, under a special act, to an incorporated railway company, and enlarged and used for public traffic under that act, it was held that the exemption could not be claimed in respect of such railway at all (s).

If a local act prescribe quarter-rating, only a very express provision in a subsequent act will do away with it (t).

Quarter Rating  
under Local Act.

By 3 & 4 Will. 4, c. 90, s. 33, the lighting and watching rate is three times higher on houses, buildings and property other than land, than it is on land. A railway is "land" within the meaning of this enactment, and therefore rateable at the lower rate only (u).

Lighting and  
watching rate.

Railway is  
"land" within  
3 & 4 Will. 4,  
c. 90, s. 33.

If a railway company be liable to be assessed to the land-tax in respect of their tolls—a point which has not been expressly decided—the redemption of the tax upon land on which the railway runs will not exempt them (x).

Land-tax on  
tolls.

### 5. Appeals and Right of Voting.

#### 5. Appeals.

An appeal against a poor rate, on the ground of inequality of rating, may be made either to the special sessions appointed by the justices under 6 & 7 Will. 4, c. 96, s. 6, or under 43 Eliz. c. 2, to the next general quarter sessions, which means the next practicable sessions after the rate was made. At some courts of quarter sessions, it is the practice to allow appeals against rates to be entered and respited, although there had been ample time to give notice of appeal, so as to try at the first sessions. But as the court of quarter sessions may, if they think fit, refuse, under such circumstances, to allow an appeal to be entered and respited, it is always desirable to give the notice for the next practicable sessions, unless some agreement to

(g) *R. v. Newport Dock Co.*, 31 L. J., M. C. 266.

(r) *South Wales R. Co. v. Swansea Local Board of Health*, 4 E. & B. 189; 24 L. J., M. C. 80.

(s) *North Eastern R. Co. v. Leadgate*, L. R., 5 Q. B. 167; 39 L. J., M. C. 66.

(t) *Walsall Overseers v. L. & W. R. Co.*, L. R., 4 App. Cas. 467.

(u) *Reg. v. Midland R. Co.*, L. R. R., 10

Q. B. 380; 44 L. J., M. C. 137.

(x) See 38 Geo. 3, c. 5, s. 4; *Vauxhall Bridge Co. v. Sawyer*, 6 Ex. 604; *Charing Cross Bridge Co. v. Mitchell*, 4 E. & B. 649. Sir W. Hodges appears to have had some doubt whether the first of these decisions was applicable to railway companies. Mr. Manley Smith, citing both decisions, expressed no such doubt.



5. Appeals.

respite the appeal be made with the respondents. If, however, the sessions allow an appeal to be entered and respited, they cannot afterwards refuse to hear it (y).

## Notice of appeal

By 12 & 13 Vict. c. 45, s. 1, fourteen clear days' notice at least must be given, and the grounds of appeal must be specified in every notice. The statute 41 Geo. 3, c. 23, s. 4, requires the notice of appeal to be in writing, and signed by the person giving the same, or his attorney, and to be delivered to, or left at the place of abode of, the churchwardens and overseers, or any two of them; the grounds of appeal to be specified in the notice (a).

And, by sect. 6, if any person appeal against any rate or assessment made for the relief of the poor, because any other person is rated or assessed in such rate or assessment, or is omitted to be rated or assessed therein, or because any other person is rated or assessed in any such rate or assessment at any greater or less sum than the sum at which he ought to be rated or assessed therein, or for any other cause that may require any alteration to be made in such rate or assessment with respect to any other person, then and in every such case the person appealing must give the notice of appeal, not only to the churchwardens or overseers, but also to the other persons interested in the event of the appeal. Care must be taken to prepare the grounds of appeal in a proper form, as no objections can be taken which are not therein specified (b). If a rate is appealed against, the parish officers may support it, without calling the vestry together (c).

## Evidence on appeals by affidavit.

By s. 48 of the Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, evidence on any rating appeal, and before any Court, of the receipts or profits of a railway company may be given by affidavit, subject to the liability of the deponent to attend to be cross-examined thereon, if required.

## Disqualification for interest.

It is beyond the scope of this work to dwell further on the subject of appeals. But it may be as well to mention the important case of *Reg. v. Sutton Coldfield* (d), in which the Court of Queen's Bench declined to entertain a case arising upon an order not finally disposing of the appeal; and *Reg. v. Justices of Cumberland* (e), in which the well known rule that judges are disqualified on ground of interest was applied to the case of a justice of the peace who had taken an active part in defending an appeal by a railway company

(y) *R. v. Justices of Wilts*, 8 B. & C. 380.

(a) See *R. v. Elyre*, 26 L. J., M. C. 14, 121, 125.

(b) See *R. v. Brooks*, 9 B. & C. 915; and 12 & 13 Vict. c. 45, s. 1; and see sects. 5 and 6 as to the costs of appeals.

(c) *R. v. Street*, 22 L. J., M. C. 29.

(d) L. R., 9 Q. B. 153; 43 L. J., Q. B. 57. For the law of appeals to Quarter Sessions, see Pritchard's Quarter Sessions; Leaming and Cross's Quarter Sessions, 2nd ed.

(e) *Reg. v. Justices of Cumberland*, 53 L. T. 491.

against an assessment committee, on which ground the High Court pronounced him disqualified (notwithstanding his *bona fides*), and quashed the order of the Court of Quarter Sessions on which he had sat.

Some difficulties have been suggested with respect to the proper mode by which railway companies, who are usually principal rate-payers in a parish, can exercise their right to vote at meetings of the vestry. When the vestry is held under 58 Geo. 3, c. 69, the 59 Geo. 3, c. 85, s. 2, provides that in all cases where a corporation or company is charged to the poor-rate, either in the name of the corporation or of any of its officers, the secretary, or other agent "duly authorized for that purpose," of the corporation or company may be present at the vestry, and may give as many votes at the vestry, in respect of the amount of the rent, profit or value of the lands, tenements or hereditaments charged to the rate, as by 58 Geo. 3, c. 69, any inhabitant assessed to the rate might be entitled to in respect of such amount. In cases which do not fall within this act (and the observation is applicable to cases where a corporation is required to enter into a recognizance for any purpose), the proper course seems to be to appoint an attorney, under the seal of the corporation, to do the desired act, whether it be to vote or to enter into a recognizance.

Vote of company  
at vestry.

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As for railway rating generally, it has been pointed out in former editions of this work that "this branch of the law is surrounded by difficulties in application all but insurmountable." Some alteration of the law appears to be called for. Not to speak of the injustice of drawing a large local revenue from that which is the chief source of local improvement, and a leading instrument in raising the value of the land of other contributors to the rates, the mode in which the revenue is raised must always cause difficulties. The Royal Commission of 1867 suggested, that "in order to meet inequalities in the local taxation of railways, some means should be devised by which some public authority, such as the Poor Law Board, should make an assessment by rating the whole railway, and then divide the amount according to an equitable principle between the several unions or parishes."

Suggested altera-  
tion of the law of  
railway rating

## CHAPTER XIX.

## THE DISSOLUTION OF RAILWAY COMPANIES.

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*1. Rights of Allottees in Bills failing to pass.*

Rights of allottees to recover deposits.

*1. The Rights of Allottees in the case of a Railway Bill failing to pass.*

It is obvious that after a railway company is formed, it is absolutely necessary to incur large expenses, for the purpose of applying to Parliament for a special act, inasmuch as engineers must be employed to make surveys of the proposed line of railway, and plans, sections and books of reference must be prepared, and notices given, in compliance with the Standing Orders in Parliament. In addition to these and similar expenses, an unsuccessful application for a special act entails the heavy charges which always accompany a struggle before a committee in Parliament.

When, then, are the allottees of shares, who have paid deposits for scrip or shares in a proposed railway undertaking, entitled to recover back the amount of their deposits? One main point to be attended to is, to ascertain the contents of the prospectuses and letters of allotment which were issued by the promoters of the undertaking; because these documents form the basis of the contract which is entered into when the deposits are paid. Thus, if the prospectus announces a capital of 500,000*l.*, divided into 10,000 shares of 50*l.* each, and a party applies for a certain number of shares, and they are allotted to him, and he pays the deposit,—in this case, if the managers of the company, who receive the deposit, proceed with the undertaking and incur expenses, without having allotted the whole number of 10,000 shares, the allottee would be entitled to recover back the whole amount of his deposit. Thus, in *Nockells v. Crosby (a)*, where

Recovery of deposit on the ground of terms of prospectus not being carried out.

(a) 3 B. & C. 814. As to how far a promoter is liable to an action for damages for deceitful representations in the pro-

spectus, see *Peck v. Guernsey*, L. R., 6 H. L. 877.

a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest, and, after some subscriptions had been paid to the director in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project, it was decided that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without the deduction of any part towards the payment of the expenses incurred. And in *Pitchford v. Davis* (b), *Fox v. Ulfston* (c), *Bourne v. Freeth* (d), and other cases, the principle above laid down was fully recognized; and the same doctrine has been applied to railway companies in the well-known case of *Walstab v. Spottiswoode* (e).

In like manner, where it was proved that the plaintiff had been induced to sign the subscribers' agreement, under circumstances which amounted to fraud in the defendants, the plaintiff recovered his deposit (f).

Recovery of deposit on ground of fraud.

Care should therefore be taken, that the prospectus does not state with more confidence than the facts justify, that the plans are ready to be deposited, and that all notices have been duly given so as to entitle the parties to apply for and obtain an act in the next session of Parliament; because if it should turn out that these statements are not correct in fact, it may become a question whether an allottee, or holder of scrip, may not recover his money back from the managing directors, on the ground that there has been a total failure of consideration.

But in the absence of fraud, and if the allottee has executed the subscribers' agreement (g), or if he has placed himself in the same situation as if he had actually signed the document (h), then he is placed in very different circumstances, as to his right to recover back the deposits. Thus, where it appeared that the shares had been allotted to the allottee upon the terms of the following letter of allotment:—"The directors assume the right to carry out their inten-

Failure to recover deposit.

*Jones v. Harrison.*

(b) 5 M. & W. 2.

(c) 6 Bing. 776.

(d) 9 B. & C. 632. See also the valuable remarks made by Sir J. Romilly, M. R., in *Jennings v. Broughton*, 22 L. J., Ch. 585.

(e) 4 Railw. Cas. 321; 10 Jur. 498; 15 M. & W. 501. See also *Galvanized Iron Co. v. Westoby*, 16 Jur. 892; 21 L. J., Exch. 302; *Ashpitel v. Sercombe*, 5 Exch. 147; *Chaplin v. Clarke*, 4 Exch. 403; *Wentner v. Shairp*, 2 Car. & K. 273; 4 C. B. 404; 4 Railw. Cas. 542; *Jarrett v. Kennedy*, 6 C. B. 319.

(f) *Jarrett v. Kennedy*, 6 C. B. 319; *Watts v. Salter*, 20 L. J., C. P. 43. Where certain directors subscribed for a

large number of shares, and paid deposits thereon, they were not allowed to treat these sums as loans advanced by them to pass the Standing Orders of the House of Commons, because this, in a legal sense, was direct fraud on Parliament. Per *Kindersley, V.-C.*, *Elements v. Bures*, 22 L. J., Ch. 1022. See also *Hallances v. Fearnle*, 38 L. J., Ch. 267.

(g) *Atkinson v. Pockock*, 1 Exch. 796; *Garwood v. Ede*, 1 Exch. 264; 5 Railw. Cas. 134.

(h) *Elements v. Twid*, 1 Exch. 268; 5 Railw. Cas. 132; *Watts v. Sulter*, 10 C. B. 477; 20 L. J., C. P. 43; *Vann v. Cobbold*, 1 Exch. 798.

1. *Rights of Allottees in Bills Pending to pass.*

*Willey v. Parratt.*

*Mowatt v. Lord Londesborough.*

tions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company for the construction of the entire railway, or any part of it, with such branches, extensions or alterations as they may find expedient, and to apply the amount paid for deposits in discharge of any liabilities incurred by them under the general powers vested in them for the prosecution of the undertaking. A subscribers' agreement and parliamentary contract, in such form, and with such provisions as the committee may think necessary, will be prepared and lie at the company's offices for signature, from &c., both inclusive:" it was ruled, that the directors had authority to lay out the deposits in such necessary expenses as had been incurred by them in the prosecution of the scheme; and, it appearing that all the deposits had been so expended, the plaintiff was nonsuited (i). And where the letter of allotment merely stated that a call for only 10s. per share would be made, "the directors considering it unnecessary to lock up the large sum of money, over and above what any expenses could require," it was decided that the case fell within the principle established in *Jones v. Harrison*, and that the money was deposited for a specific object, *i.e.*, the payment of the expenses, which meant the preliminary expenses (k).

But where, by a circular letter, the promoters of a company stated that, in the event of the bill not being obtained, the whole of the deposits would be returned without deduction, it was ruled that an allottee of shares was entitled to recover both the deposits on the failure of this condition, although he had subsequently executed the subscribers' contract, which authorized the directors to reimburse themselves for preliminary expenses out of the deposits (l).

2. *Winding-up of Companies under Abandonment Acts.*

2. *Winding-up under the Abandonment Acts.*

The winding-up of a railway company after the passing of the special act is regulated by the Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), as amended by sects. 31—35 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), and the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114). These statutes apply only to companies authorized to make railways by acts passed before

(i) *Jones v. Harrison*, 2 Exch. 52; 5 Railw. Cas. 188.

(k) *Willey v. Parratt*, 3 Exch. 211.

(l) *Mowatt v. Lord Londesborough*, 3 E. & B. 307; 23 L. J., Q. B. 177; 4 E.

& B. 1. See also *Ex parte Lord Londesborough*, 22 L. J., Ch. 736; *Ward v. Lord Londesborough*, 12 C. B. 252; *Ex parte Mowatt*, 22 L. J., Ch. 578; 1 Drew. 247.

the Session of 1867 (*m*), but apply to such companies whether their railways have been opened for traffic or not, although they have not, it is believed, been ever put in force with reference to a company whose line was open for traffic.

The Act of 1850, sects. 1—28,\* provides for the issue by the Board of Trade of a warrant for the abandonment of any railway, "whether commenced or not," upon the application of the holders of three-fifths of the shares of the company. After the granting of the warrant of the Board of Trade the company continues to exist only for the purpose of winding-up of its affairs (Act of 1850, s. 29). A petition for winding-up the affairs of the company may be presented under the Companies Acts, 1862 and 1867; (1) By the company; (2) By a creditor or creditors (*n*); (3) By a contributory or contributories (*o*); (4) By the Board of Trade on the application of certain persons interested in the company (Act of 1867, s. 32; Act of 1869, s. 4).

Warrant of  
Board of Trade.  
\* Page 425, ante

Winding-up of  
company.

The company is then deemed to be an unregistered company which may be wound up under the Companies Acts, 1862 and 1867 (Act of 1869, s. 4). If the warrant for abandonment was made (as it usually is (*p*)) on condition that the money deposited as security for the completion of the railway, or secured by bond conditioned for its completion, should be applied as part of the assets, the Court may direct that such money shall not be applicable for the payment of any debt which appears to have been incurred on account of the promotion of the company (*l*, s. 5). The Court has jurisdiction to make an order for winding-up, without the consent of a party who has advanced the deposit on a security from the company (*q*). The claims of parliamentary agents have been held to be debts incurred in the promotion of the company (*r*); so also have the claims of a

(*m*) Act of 1850, s. 1; Act of 1867, s. 31, post, Appendix.

(*n*) Before the Act of 1869, a creditor could not petition. See *Re North Kent R. Extension Co.*, L. R., 8 Eq. 368.

(*o*) Sect. 40 of the Companies Act, 1867, is as follows:—"No contributory of a company under the principal act [of 1862] shall be capable of presenting a petition for winding-up such company unless the members of the company are reduced to less than seven, or unless the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for a period of at least six months during the eighteen months previously to the commencement of the winding-up, or have devolved upon him through the death of a former holder; provided that where a share has during the whole or any part

of the six months been held by or registered in the name of the wife of a contributory either before or after her marriage, or by or in the name of any trustee or trustees for such wife or for the contributory, such share shall, for the purposes of this section, be deemed to have been held by and registered in the name of the contributory." By sect. 74 of the principal act (the Joint Stock Companies Act, 1862, 25 & 26 Vict. c. 89), the term "contributory" means "every person liable to contribute to the assets of the company, in event of the same being wound up."

(*p*) See *Darry R. Co.*, In re, L. R. 4 Ch. D., at p. 316.

(*q*) *Re Waterford, Lismore and Fernway R. Co.*, L. R., 4 Eq. 490; 19 W. R. 145.

(*r*) *Re Brampton and Longtown R. Co.* L. R., 10 Eq. 613. See also *Re Kensington*

2. Winding-up  
of Companies  
under Abandon-  
ment Acts.

solicitor for the costs of procuring two amending acts (s); and the cost of a petition by the depositor for the transfer to him of the bulk of the deposit moneys have been ordered to be paid out of the general assets of the company (t).

Dock company.

A dock company incorporated by special act, with power to construct a short subsidiary branch railway, is not a railway company within the exception of the 199th section of the Joint Stock Companies Act, 1862, which section provides that "any partnership association or company, except railway companies incorporated by Act of Parliament," may be wound up under that act (u).

*ton Station Act*, L. R., 20 Eq. 197; 32 L. T. 188; a peculiar case, in which the special act was passed in 1859, and the warrant of abandonment was granted in 1878, upon condition that the money secured by the bond should be applied as part of the assets of the company. The railway had never been commenced, and until the granting of the warrant the company had no assets. It was held that

the Statute of Limitations was no bar to the claims of parliamentary agents and solicitors for work done for the promoters before the passing of the act.

(s) *Barry R. Co.*, *In re*, L. R., 4 Ch. D. 315.

(t) *Re Langhorne R. Co.*, L. R., 12 Eq. 454.

(u) *Re Rammouth Docks Co.*, L. R., 17 Eq. 181; 48 L. J., Ch. 110.

## APPENDIX.

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### THE RAILWAY RATES RULES, 1888 (a).

THE RAILWAY AND CANAL TRAFFIC ACT, 1888.

(51 & 52 VICT. c. 25.)

*Board of Trade Rules with respect to classifications of merchandise traffic, and schedules of maximum rates and terminal charges applicable thereto, to be submitted to the Department under the provisions of the above Act (so far as regards Railways) (b).*

#### NOTE.

*Section 24 of the Act provides as follows:—*

“(1.) Notwithstanding any provision in any general or special Act, every railway company shall submit to the Board of Trade a revised classification of merchandise traffic, and a revised schedule of maximum rates and charges applicable thereto, proposed to be charged by such railway company, and shall fully state in such classification and schedule the nature and amounts of all terminal charges proposed to be authorised in respect of each class of traffic, and the circumstances under which such terminal charges are proposed to be made. In the determination of the terminal charges of any railway company regard shall be had only to the expenditure reasonably necessary to provide the accommodation in respect of which such charges are made, irrespective of the outlay which may have been actually incurred by the railway company in providing that accommodation.

“(2.) The classification and schedule shall be submitted within six months from the passing of this Act, or such further time as the Board of Trade may, in any particular case, permit, and shall be published in such manner as the Board of Trade may direct.

“(3.) The Board of Trade shall consider the classification and schedule,

(a) *Note by Editor.*—The Editor is responsible for this title, which he has adopted to distinguish the present rules from the forthcoming Canal Tolls and Rates Rules, and Railway and Canal Commission Rules.

(b) *Note by Editor.*—These Rules were also submitted in draft to both Houses of Parliament on the 10th of August. There

have been no material alterations.

The Rules are made under s. 35 of the Act. The “maximum rates” are those charged when the companies act as carriers, and the tolls for the use of the line, and the charges for engines are left untouched, such being the presumed intention of the Legislature in speaking of maximum rates, not tolls.



and any objections thereto, which may be lodged with them on or before the prescribed time and in the prescribed manner, and shall communicate with the railway company and the persons (if any) who have lodged objections, for the purpose of arranging the differences which may have arisen.

"(4.) If, after hearing all parties whom the Board of Trade consider to be entitled to be heard before them respecting the classification and schedule, the Board of Trade come to an agreement with the railway company as to the classification and schedule, they shall embody the agreed classification and schedule in a Provisional Order, and shall make a report thereon, to be submitted to Parliament, containing such observations as they think fit in relation to the agreed classification and schedule.

"(5.) When any agreed classification and schedule have been embodied in a Provisional Order, the Board of Trade, as soon as they conveniently can after the making of the Provisional Order (of which the railway company shall be deemed to be the promoters), shall procure a Bill to be introduced into either House of Parliament for an Act to confirm the Provisional Order, which shall be set out at length in the schedule to the Bill.

"(6.) In any case in which a railway company fails within the time mentioned in this section to submit a classification and schedule to the Board of Trade, and also in every case in which a railway company has submitted to the Board of Trade a classification and schedule, and after hearing all parties whom the Board of Trade consider to be entitled to be heard before them, the Board of Trade are unable to come to an agreement with the railway company as to the railway company's classification and schedule, the Board of Trade shall determine the classification of traffic which, in the opinion of the Board of Trade, ought to be adopted by the railway company, and the schedule of maximum rates and charges, including all terminal charges proposed to be authorised applicable to such classification which would, in the opinion of the Board of Trade, be just and reasonable, and shall make a report, to be submitted to Parliament, containing such observations as they may think fit in relation to the said classification and schedule, and calling attention to the points therein on which differences which have arisen have not been arranged.

"(7.) After the commencement of the session of Parliament next after that in which the said report of the Board of Trade has been submitted to Parliament, the railway company may apply to the Board of Trade to submit to Parliament the question of the classification and schedule which ought to be adopted by the railway company, and the Board of Trade shall on such application, and in any case may, embody in a Provisional Order such classification and schedule as in the opinion of the Board of Trade ought to be adopted by the railway company, and procure a Bill to be introduced into either House of Parliament for an Act to confirm the Provisional Order, which shall be set out at length in the schedule to the Bill.

"(8.) If, while any Bill to confirm a Provisional Order made by the Board of Trade under this section is pending in either House of Parliament, a petition is presented against the Bill or any classification and schedule comprised therein, the Bill, so far as it relates to the matter petitioned

against, shall be referred to a Select Committee, or if the two Houses of Parliament think fit so to order, to a joint Committee of such Houses, and the petitioner shall be allowed to appear and oppose as in the case of a private Bill.

“(9.) In preparing, revising, and settling the classifications and schedules of rates and charges, the Board of Trade may consult and employ such skilled persons as they may deem necessary or desirable; and they may pay to such persons such remuneration as they may think fit and as the Treasury may approve.

“(10.) The Act of Parliament confirming any Provisional Order made under this section shall be a public general Act, and the rates and charges mentioned in a Provisional Order as confirmed by such Act shall, from and after the Act coming into operation, be the rates and charges which the railway company shall be entitled to charge and make.

“(11.) At any time after the confirmation of any Provisional Order under this section any railway company may, and any person, upon giving not less than twenty-one days notice to the railway company may apply in the prescribed manner to the Board of Trade to amend any classification and schedule by adding thereto any articles, matters, or things, and the Board of Trade may hear and determine such application, and classify and deal with the articles, matters, or things referred to therein in such manner as the Board of Trade shall think right. Every determination of the Board of Trade under this sub-section shall forthwith be published in the ‘London Gazette,’ and shall take effect as from the date of the publication thereof.

“(12.) Nothing in this section shall apply to any remuneration payable by the Postmaster-General to any railway company for the conveyance of mails, letter bags, or parcels under any general or special Act relating to the conveyance of mails, or under the Post Office (Parcels) Act, 1882.

“(13.) Nothing in this section shall apply to any remuneration payable by the Secretary of State for War to any railway company for the conveyance of War Office stores under the powers conferred by the Cheap Trains Act, 1883.”

*Section 86 of the Act provides as follows:—*

“All the provisions of Part II. of this Act relating to any railway company shall, so far as applicable, apply to every canal company, and to every railway and canal company; and in Part II. of this Act, unless the context otherwise requires, the expression ‘railway company’ shall include a canal company and railway and canal company, and the expression ‘railway’ shall include a canal, and the expression ‘rate’ shall include tolls and dues of every description chargeable for the use of any canal or by any canal company.”

*NOTE.—It is desirable that all memorials, objections, and other documents should be printed. In any case they should be on paper of foolscap size, written or printed on one side of the paper only, and with a quarter margin.*

## RULES.

*Proposed Classification and Schedule.*

Form of proposed classification and schedule.

1. The revised classification of merchandise traffic and revised schedule of maximum rates and charges applicable thereto to be submitted by every company to the Board of Trade under the Act (in these rules referred to as "the proposed classification and schedule") shall be, as far as practicable, in the Form No. 1 in the Appendix with such variations as circumstances may require (c). There shall be fully stated in the proposed classification and schedule amongst other things :—

- (a.) The proposed rates and charges in respect of train loads and truck loads, or for increased quantities so far as is applicable to the traffic, and also for small packages and parcels, and for other merchandise traffic if and when conveyed by passenger or special train.
- (b.) The nature and amounts of all terminal charges proposed to be authorised in respect of each class of traffic, and the circumstances under which such terminal charges are proposed to be made.
- (c.) As far as practicable, the existing maximum rates which the company are by statute authorised to charge for the goods mentioned in the classification.
- (d.) As far as practicable, the existing terminal charges in respect of the several classes of traffic, showing in each case the authority for making the charge.

Time for submission of classification and schedule, printing, &c.

2. The proposed classification and schedule shall\* be submitted to the Board of Trade as soon as may be after the passing of the Act (d). It shall be in print, and must be printed on one side only of the page of paper, so as to leave the back of the page blank. Three printed copies must be transmitted to the Board of Trade, one of which must be sealed with the seal of the company, and signed by the secretary. At the end of the proposed classification and schedule, or on some conspicuous part of the print thereof, a notice must be inserted stating that objections are to be made by notice of objection addressed and sent by post to the Board of Trade, marked on the outside of the cover enclosing it "Railway and Canal Traffic Act, 1888," and that the notice of objection is to be sent to the Board of Trade within eight weeks from the date of the first advertisement of the submission of the proposed classification and schedule.

Existing rates and charges, when and how to be stated.

3. Where the company are unable to set out in the proposed classification and schedule statements of the existing maximum rates and charges, and the existing terminal charges in respect of the several classes of traffic

(c) *Note by Editor.*—From a comparison of the form in Appendix No. 1, with the clauses now generally in use (see sample, ante, p. 457), it will be seen that great changes in form will be effected by the proposed classification and schedule. The truck rates, the train-load rates, and the rates graduated by distance are new; but this graduation of rates by distance and quantity is, it is conceded, intended to

operate by way of qualification of the mileage rate.

(d) *Note by Editor.*—See sub-s. 2 of s. 24, ante, p. 697.

The Act passed on the 10th August, 1888. These Rules were made on the 19th November, and submitted to Parliament on the 20th November, 1888. They had, however, been submitted in draft (see note (b), ante), long before.

mentioned in the proposed classification and schedule, the company shall transmit with the proposed classification and schedule a printed statement, made out in a tabular form, showing, as far as practicable, the existing maximum rates and charges for merchandise traffic which the company are authorised to charge, and the existing terminal charges, showing the authority for each of them. Where the statement cannot be made out in a tabular form, the several rates must be set out against the items or group of items. Three printed copies must be sent.

4. With the proposed classification and schedule there must also be sent three printed copies of the following :—

Additional documents to be forwarded to Board of Trade.

- (a.) A statement and map showing the lines of railway to which the proposed classification and schedule are to apply (e), specifying with respect to each line whether it is owned, leased, or worked, or partly owned, leased, or worked by the company.
- (b.) A statement setting forth all the cases in which the company have been authorised to demand and receive any special rates or charges in respect of any lines, stations, or works.
- (c.) A statement of the names of the several newspapers in which the company propose to advertise that the proposed classification and schedule have been submitted.

5.—(1.) The company shall, within one week from the date of the submission to the Board of Trade of the proposed classification and schedule, publish advertisements of the fact that a proposed classification and schedule have been submitted to the Board of Trade—

Advertisements.

- (a.) In the London, Edinburgh, or Dublin Gazette, according as the line of railway affected is situate or partly situate in England, Scotland, or Ireland.
- (b.) In such newspapers circulating in the districts served by the company's system as the Board of Trade may in each case approve, or, in default of such approval, as the company shall select.
- (c.) At every passenger station on the company's system.

The advertisement shall be in the Form No. 2 in the Appendix, with such variations as circumstances may require, and there shall be set out therein, amongst other things, the following statements :—

- (d.) That anyone wishing to raise objections to the proposed classification and schedule may forward by post a notice of objection to the Board of Trade in the prescribed form, marked on the outside of the cover enclosing it "Railway and Canal Traffic Act, 1888," on or before the expiration of eight weeks from the date of the first advertisement ;
- (e.) The date on which the term of eight weeks expires ;
- (f.) That every objector must transmit to the secretary of the company at its principal office a copy of the notice of objection ;

(e) *Note by Editor.*—These words do not appear to leave an opening for different charges on different lines owned by the

same company, in consideration of differences in expense of construction.

(g.) That printed copies of the proposed classification and schedule can be obtained at the price of one shilling at the principal office of the company, or on application to any station-master.

Station advertisements.

6. Each station advertisement shall be printed in large type, and posted in a conspicuous place in the station.

Copies of classification to be kept by company for sale.

7. Printed copies of the proposed classification and schedule shall be kept at the principal office of the company for sale to any applicant, and shall be obtainable from any station-master of the company at the price of one shilling per copy.

Fees and expenses.

8. The company shall, with the proposed classification and schedule, transmit to the Board of Trade the sum of 50*l.*, which may be paid by a cheque for that sum drawn by the company, and payable to an assistant secretary of the Board of Trade. This fee will not necessarily cover the costs of all inquiries and other matters arising upon the settlement of the classification and schedule, and the company may be required to defray any expenses incurred by the department which are not covered by the said sum of 50*l.*

#### *Objections (f).*

Form of notice of objection.

9. Every objection must be submitted to the Board of Trade by a notice of objection in writing or print. Form No. 3 shall be used, with such variations as circumstances shall require.

Signature and address of objector.

10. Every notice of objection shall be signed by the person making the objection, or where the objection is by a company or body or association of persons, by some person or persons on behalf of the company, body, or association, and shall state a postal address to and at which notices may be served or communications addressed to the objector or objectors.

Transmission of notices of objection.

11. Every notice of objection shall be transmitted by post to the Board of Trade within eight weeks from the date of the first advertisement of the submission of the classification and schedule to the Board of Trade, and there shall be marked on the outside of the cover enclosing each notice of objection "Railway and Canal Traffic Act, 1888."

Notice of objection to be sent to company.

12. A copy of every notice of objection must at the same time be sent to the secretary of the company affected thereby, by prepaid letter, addressed to the company at its principal office.

Grounds of objection to be stated.

13. Every notice of objection shall state clearly and as concisely as possible, by reference to the proposed classification and schedule, the precise portion of the classification or schedule objected to, and the grounds of objection.

Hearing of objections.

14. After the expiration of eight weeks from the date of the first advertisement of the submission of the proposed classification and schedule to the Board of Trade, a time and place shall be appointed by the Board

(f) *Note by Editor.* — Objections to *maximum* rates, even if they should succeed, would not, except in case of short distances (where the maximum is believed to be commonly charged) be of much use, unless they result in narrowing the usually wide margin (see p. 451, ante) between

the maximum and the actual charge. In connection with this view, see and consider the restriction of "reasonableness," contained in sect. 86 of the Railways Clauses Act, 1845, and the comments upon that section (p. 447, ante).

of Trade for disposing of the objections which have been duly lodged with the Board of Trade, notice whereof shall be given by post to each objector at the address mentioned in the notice of objection, and to the secretary of the company.

15. If any objector or the company fails or fail to attend at the time appointed for disposing of objections, the Board of Trade may proceed to dispose of the matter in the absence of any of the parties interested, or may adjourn the hearing of the matter. Default in attendance on hearing of objections.

#### *Miscellaneous.*

16. The time for doing any act required by these Rules to be done may be extended by the Board of Trade, notwithstanding that the time prescribed for doing the act may have expired, and the Board of Trade may, if they think fit, in any special case dispense with the performance by the company or any objector of any act required to be done under these Rules. Extension of time, &c.

17. In these Rules, unless the context otherwise requires,—  
 “The Act” means the Railway and Canal Traffic Act, 1888. Interpretation of terms.  
 Words importing the singular number include the plural number, and words referring to persons shall be deemed to refer by that expression to corporations and bodies of persons.

By the Board of Trade,

COURTENAY BOYLE,

*Assistant Secretary,*

*Railway Department.*

*Dated the 19th day of November, 1888.*

#### APPENDIX.

##### FORMS.

##### No. 1.—*Proposed Classification of Merchandise Traffic and Schedule of Maximum Rates and Charges.*

##### INSTRUCTIONS.

1. If the existing maximum rates in respect of the various items in any class cannot be easily tabulated, such rates should be set out against each item or group of items.

2. In the case of each class of traffic the company should state the amount of the terminal charges proposed to be authorised, specifying closely the various services in respect of which such charges are to be made, the amount intended to be charged for each service, and the amounts at present charged.

3. The proposed rates and charges for small packages (not exceeding 500 pounds in weight), parcels, and merchandise traffic in passenger trains are to be stated as indicated in the Form.

##### I.—MINERAL TRAFFIC.

##### CLASS A.

[State how carried, and other particulars.]

[Set out list of articles.]

## APPENDIX.

## MAXIMUM RATES.

PROPOSED MAXIMUM RATES.									PROPOSED TERMINAL CHARGES.		EXISTING MAXIMUM RATES.	OBSERVATIONS
* For first Miles, or any part of such distance.			* For next Miles, or any part of such distance.			* For the Remainder of the distance.			Nature of Charge.	Amount of Charge.		
Per train per mile.	Per truck per mile.	Per ton per mile.	Per train per mile.	Per truck per mile.	Per ton per mile.	Per train per mile.	Per truck per mile.	Per ton per mile.				
†	‡											
<p>* The adoption of a system of graduated rates in this Table is not to be taken as an intimation that such a system or mode of charging is prescribed by the Board of Trade.</p> <p>† State the number of trucks.</p> <p>‡ State the number of tons per truck load.</p>									<p>Note.—It should be stated under what circumstances each terminal charge is proposed to be made.</p>		<p>When more scales than one, state highest and lowest authorised.</p>	

## CLASS B.

[State how carried, and other particulars.]

[Set out list of articles.]

## MAXIMUM RATES.

[As above.]

[N.B.—This classification to be continued for the different classes of goods traffic.]

## ANIMAL CLASS.

## EXCEPTIONAL ARTICLES.

SMALL PACKAGES, PARCELS, AND MERCHANDISE TRAFFIC CONVEYED  
BY PASSENGER TRAINS.

REGULATIONS AS TO MERCHANDISE TRAFFIC.

---

No. 2.—*Advertisement.*

THE RAILWAY AND CANAL TRAFFIC ACT, 1888.

PROPOSED REVISION OF CLASSIFICATION AND RATES AND CHARGES FOR  
MERCHANDISE TRAFFIC.

[Name of Company.]

Notice is hereby given that, pursuant to the Railway and Canal Traffic Act, 1888, this company has submitted to the Board of Trade a proposed revised classification of merchandise traffic, and revised schedule of maximum rates and charges applicable thereto, proposed to be charged by this company; and that in such proposed classification and schedule there are stated the nature and amounts of all terminal charges proposed to be charged in respect of each class of traffic, and the circumstances under which the terminal charges are proposed to be made.

Printed copies of the proposed classification and schedule can be obtained at the price of 1s. at the principal office of the company [*here state the address*], or from any station-master of the company.

Anyone wishing to raise any objection to the proposed classification and schedule may forward, by post, a notice of objection to the Board of Trade, marked on the outside of the cover enclosing it "Railway and Canal Traffic Act, 1888."

Notices of objection must be transmitted to the Board of Trade so as to reach there on or before the expiration of eight weeks from the day of

Every objector must transmit to the secretary of the company at its principal office [*here state the address*] a copy of the notice of objection, otherwise the objection will be liable to be dismissed without being heard.

Due notice will be given of the time appointed by the Board of Trade for hearing and disposing of notices of objection.

Secretary.

---

No. 3.—*Notice of Objection.*

RAILWAY AND CANAL TRAFFIC ACT, 1888.

TO THE BOARD OF TRADE:

I, the undersigned [*All in Christian and surname of objector*] hereby give notice that I object to the parts of the proposed classification of merchandise traffic and schedule of rates and charges of the company set forth in the first



## APPENDIX.

column of the schedule to this notice, on the ground set forth in the second column of this notice, and that my address, to which all notices and communications may be sent, is [*here state address of objector in full*].

(Signed)

Dated the            day of            .

## SCHEDULE.

Reference to Proposed Classification and Schedule	Grounds of Objection.

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